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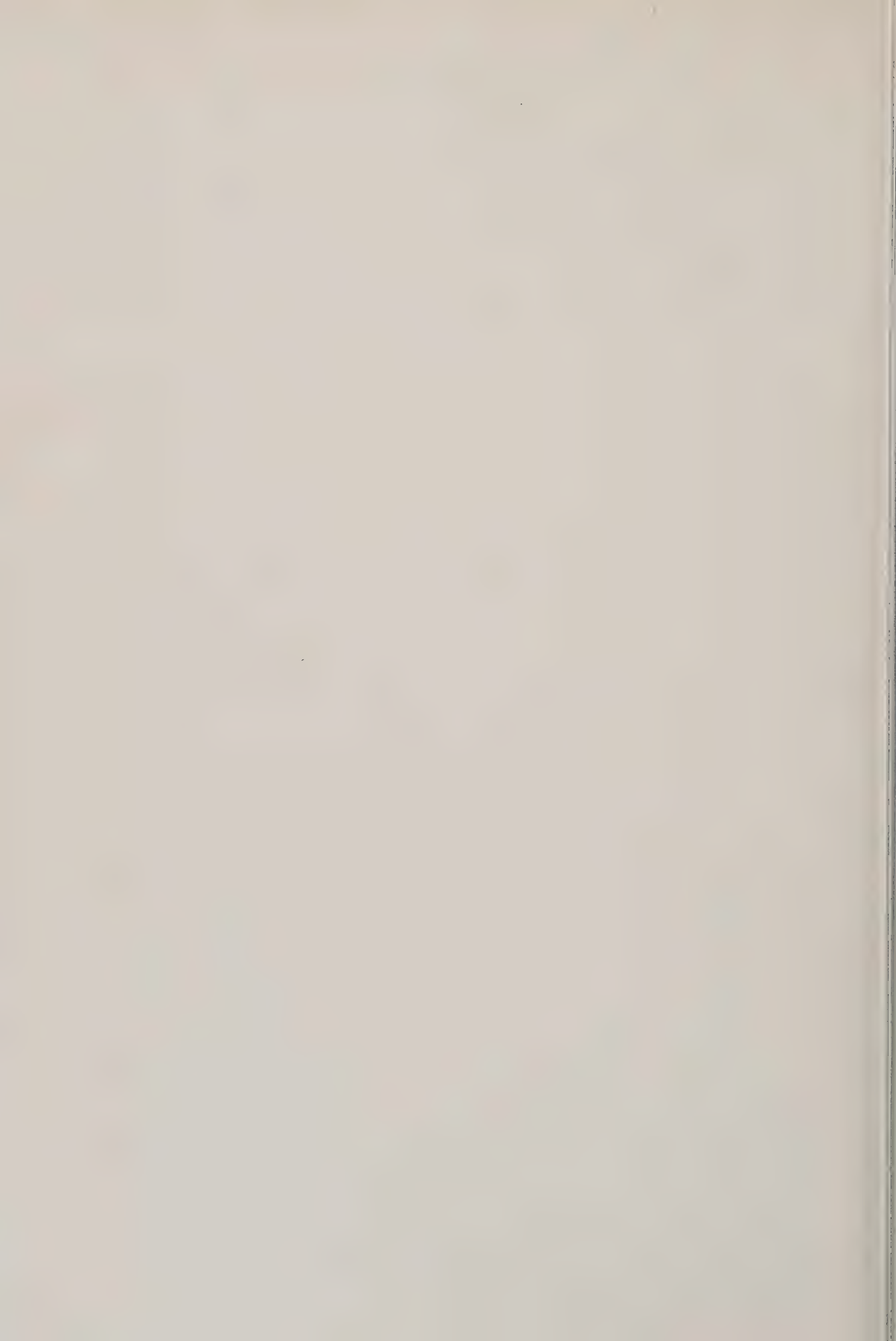
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6—261 P.2d 318, 120 A.C.A. 626
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PEOPLE v. THOMAS.

Cr. 5375.

Supreme Court of California, in Bank.

Sept. 18, 1953.

Rehearing Denied Oct. 15, 1953.

Defendant was convicted of murder in the first degree without recommendation. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction, and appeal was automatically taken. The Supreme Court, Shenk, J., held that instruction that where killing is by "lying in wait", and act causing death is intentional, such killing is murder in first degree whether it was intentional or unintentional, was not prejudicial in view of fact that instruction contained proper definition of expression "lying in wait" and that court made it sufficiently clear by instructions that act of lying in wait alone did not constitute the crime but that when murder had been established and was found to have been committed by lying in wait, the law fixed the degree of the crime.

Judgment affirmed.

Schauer and Carter, JJ., dissented.

1. Homicide $\Rightarrow$ 22(1)

Where defendant commits murder by lying in wait, jury has no choice but to designate such offense as murder in the first degree. Pen.Code, § 189.

2. Homicide $\Rightarrow$ 9

Where a murder is shown to have been committed by lying in wait a showing of intent is unnecessary to fix the degree. Pen.Code, § 189.

3. Homicide $\Rightarrow$ 340(1)

In murder prosecution, instruction that where killing is by "lying in wait", and act causing death is intentional, such killing is murder in first degree whether it was intentional or unintentional, was not pre-

judicial in view of fact that instruction contained proper definition of expression "lying in wait" and that court made it sufficiently clear by instructions that act of lying in wait alone did not constitute the crime but that when murder had been established and was found to have been committed by lying in wait, the law fixed the degree of the crime. Pen.Code, § 189.

Al Matthews and John Oliver, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen. and Frank Richards, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant was found guilty of murder in the first degree without recommendation. The victim was Nina Marie Bice. A motion for a new trial was denied and the extreme penalty was imposed. In this appeal, automatically taken under Penal Code, section 1239(b), the sole contention of the defendant is that the court misdirected the jury by giving an improper instruction on "lying in wait", hereinafter quoted in full.

The defendant was charged by information in Count I that on or about August 29, 1951, he wilfully, unlawfully, feloniously and with malice aforethought murdered Nina Marie Bice. In Counts II, IV, VI, VIII, X and XII he was charged with the attempted murder of each of several persons he shot at but failed to kill. In Counts III, V, VII, IX, XI, and XIII he was charged with assault with a deadly weapon on each of those same persons. The defendant pleaded not guilty and not guilty by reason of insanity to each of the thirteen counts. At the commencement of

the trial the prosecution moved for a severance of Count I from all the other counts. The defense agreed to the severance and the motion was granted. Thereupon the defendant withdrew his plea of not guilty by reason of insanity as to Count I. Following the conviction on Count I the other counts were ordered off calendar.

The facts of this case are not in dispute. In the evening of April 15, 1952, the defendant paid a social call on a neighborhood woman in Los Angeles County. He left at approximately 10:00 p. m., and shortly thereafter a shot was fired through the front window of the woman's home, injuring no one. Upon questioning by the sheriff's deputies the following day, the defendant admitted he fired the shot. A stenographic statement was taken at this time. In the statement the defendant related the following additional shootings:

On August 27, 1951, he shot at his first victim, a woman waiting at a corner telephone booth at about 10:30 in the morning. The bullet entered below the left shoulder blade. Following surgery she recovered from the wound. On August 28, 1951 he shot through the front window of a home, injuring no one.

On August 29, 1951 between 10:00 and 10:30 p. m. he shot and killed Mrs. Nina Marie Bice. She was sitting on a stool next to the counter of a small lunch stand located at 1021 Atlantic Boulevard in Los Angeles County. The defendant stated that he noticed her as he drove by on his way to work; that he drove down an alley and stopped at a distance of about 200 feet from the lunch counter; that he took a .22 caliber rifle from under the back seat of his car; that he shot once at the woman, trying to knock a coffee cup out of her hands; that he saw her slump over the counter, and that he started his car and drove past the lunch counter where the victim had been laid out on the ground. The bullet entered the deceased's right ear killing her immediately.

On October 16, 1951, at eight o'clock in the morning, the defendant shot at an eleven year old school girl, standing on a

corner waiting for a bus. The bullet shattered a bone in the girl's forearm.

On November 23, 1951 at about 9:30 in the morning the defendant shot at a woman working in her yard with her son and daughter and three of their friends. The bullet entered her right thigh and was removed by surgery.

On December 25, 1951 at about 10:30 in the evening the defendant shot through a window at a woman ironing in her home. The bullet entered her abdominal cavity and lodged in a position where it was too hazardous to be removed.

With the exception of the final shooting, the defendant stated that he was acquainted with none of the women at whom he shot or at whose homes he shot. He purchased the .22 caliber rifle, used in each instance, in July, 1951, and carried it under the rear seat of his automobile. In some cases he shot from the automobile, and in others from outside of it. The only reason given for the shootings was that in some of the cases he experienced a sexual satisfaction while in the commission of the act or shortly thereafter.

On April 17, 1952 a sworn statement was taken from the defendant in the office of the district attorney. The statement was substantially the same as that taken by the sheriff's deputies the previous day and recited the same facts, although in greater detail than above related. Again the defendant gave no motive, other than the sexual satisfaction he experienced.

At the trial the two statements made by the defendant were read into the record. The victims, with the exception of the deceased, testified as to the shootings and other witnesses testified as to the shooting of the deceased. There was expert testimony to the effect that the defendant, a married man, led a frustrated sexual life at home and the shootings were an outlet for his sexual drive in his particular case. Expert opinion as to the defendant's mental ability varied from "subnormal" to "above average." The only testimony given by the defendant was that he had been in an automobile accident in 1948 and was rendered unconscious for six hours, and

that during the remainder of the year 1948 he suffered headaches. The court ruled that this did not open up to cross-examination the entire field of the defendant's conduct. The defendant was not examined in court as to the commission of the acts charged against him.

The defendant contends that because there is no proof that he had intent to kill, a properly instructed jury would have returned a verdict of murder of the second degree. Section 189 of the Penal Code reads as follows: "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree." The section purports to set forth the degree of a crime previously determined to be "murder." "Murder is the unlawful killing of a human being, with malice aforethought." Penal Code, § 187.

[1] The court correctly instructed the jury on murder by lying in wait as follows:

"Murder which is perpetrated by lying in wait is declared by our law to be murder of the first degree, and if you should find that the defendant committed that crime, you will have no choice but to designate the offense as murder in the first degree."

The defendant brings into question the further instruction of the court defining "lying in wait":

"The words 'lying in wait' do not refer to the position of the body of the person who commits a killing. There may be a 'lying in wait' within the meaning of the law where such person is sitting down, standing or to a degree moving about. The gist of 'lying in wait' is that the person places himself in a position where he is waiting and watching and concealed from the person killed with the intention of inflicting bodily injury upon such person or of killing such person. There is nothing in the law that requires that the 'lying in wait' exist for or consume any particu-

lar period of time before the firing of a shot or other act which caused the death. It is only necessary that the act causing death be preceded by and the outgrowth of the 'lying in wait'.

"Where the killing is by 'lying in wait', and the act causing death was intentional, it is murder of the first degree, whether the killing was intentional or unintentional, as in such case it is not necessary that there exist in the mind of the perpetrator an intent to kill."

[2] The defendant contends that the instruction was improper because it permitted the jury to convict of first degree murder where there was no evidence of a specific intent to kill. But where a murder is shown to have been committed by 'lying in wait' a showing of intent is unnecessary to fix the degree. In *People v. Bernard*, 28 Cal.2d 207, it is stated at page 211, 169 P.2d 636, at page 639: "* * * the murderer who kills by torture or poison may intend only to inflict suffering, not death. Evidence of the means used might support an inference that the killing was willful, deliberate, and premeditated, but where the jury has found that the killing was by poison, lying in wait, or torture it is not their [the jury's] function to go farther and draw inferences as to the manner of the formation and carrying out of an intention to kill. In such a case the question which the statute (Pen.Code, § 189) answers affirmatively is not, 'Is the killing willful, deliberate and premeditated?'; it is, 'Is the killing murder of the first degree?' Killings by the means or on the occasions under discussion are murders of the first degree because of the substantive statutory definition of the crime." See also *People v. Tuthill*, 31 Cal.2d 92, 99, 187 P.2d 16.

The defendant relies upon an excerpt from *People v. Howard*, 1930, 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385, where it is stated: "To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, the unlawful killing must be accompanied with a deliberate and clear

intent to take life." In that case the deceased died from a blow on the head received in the course of a struggle following an argument with the defendant. It was held that the evidence did not show that the murder was willful and deliberate. The question of murder by lying in wait was not in issue, and the statement of the court cannot fairly be construed to mean that where a murder by lying in wait is committed it cannot be murder of the first degree unless accompanied by proof of a specific intent to kill.

[3] As above noted the court instructed the jury that "Where the killing is by 'lying in wait', and the act causing death was intentional, it is murder of the first degree whether the killing was intentional or unintentional. * * *" It is contended that this is not a complete statement of the law; that under such an instruction one could be convicted of murder of the first degree where by lying in wait he sought merely to play a prank upon the deceased but instead created circumstances which caused death, and that the instruction ignores the provisions of the Penal Code which presuppose that a "murder" as distinguished from a "killing" has been committed, in which event it is of the first degree if perpetrated by lying in wait.

It may be assumed that the instruction standing alone is not as exact as it might be. Still no prejudice to the defendant resulted therefrom. It was contained in a definition of the expression "lying in wait". Therein the court correctly set forth the physical aspects of the act. It made it sufficiently clear that the act of lying in wait alone did not constitute the crime but

that when *murder* had been established and was found to have been committed by lying in wait as that act was defined in the instruction the law fixes the degree of the crime. Considering the instructions as a whole it is clear that when the court made reference to a "killing" it was reasonably understood by the members of the jury to be a killing which constituted murder. The court had fully and correctly instructed the jury on the distinction between first and second degree murder and on all aspects of the law applicable to the facts including intent and how it could be manifested and proved. It had instructed that "you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others."

The defendant was convicted on undisputed evidence. He had a full and a fair trial. No reason has been advanced which would justify a reversal.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and TRAYNOR and SPENCE, JJ., concur.

TRAYNOR, Justice.

I concur, but wish to amplify the reasons for my concurrence.

Two basic questions are presented on this appeal: (1) Was the instruction on lying in wait erroneous? (2) Was the evidence insufficient to warrant the giving of an instruction on lying in wait?

The instruction on lying in wait¹ was erroneous in stating, "Where the killing is by

1. "The words 'lying in wait' do not refer to the position of the body of the person who commits a killing. There may be a 'lying in wait' within the meaning of the law where such person is sitting down, standing or to a degree moving about. The gist of 'lying in wait' is that the person place himself in a position where he is waiting and watching and concealed from the person killed with the intention of inflicting bodily injury upon such person or of killing such person. There is nothing in the law that requires that the 'lying in

wait' exist for or consume any particular period of time before the firing of a shot or other act which caused the death. It is only necessary that the act causing death be preceded by and the outgrowth of the 'lying in wait'.

"Where the killing is by 'lying in wait', and the act causing death was intentional, it is murder of the first degree, whether the killing was intentional or unintentional, as in such case it is not necessary that there exist in the mind of the perpetrator of an intent to kill."

'lying in wait', and the act causing death was intentional, it is murder of the first degree, whether the killing was intentional or unintentional, as in such case it is not necessary that there exist in the mind of the perpetrator an intent to kill."

A "killing" by means of lying in wait is not murder of the first degree unless it is first established that it is murder. Only then can the question arise whether it is murder of the first degree because perpetrated by lying in wait. Under the instruction given an unintentional killing that did not amount to murder would nevertheless be murder of the first degree. This error is fundamental.

The following statutory definitions of murder, malice aforethought, and first degree murder must first be carefully considered.

"Murder is the unlawful killing of a human being, with malice aforethought." Penal Code, § 187.

"Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Penal Code, § 188.

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288 [lewd or lascivious act against a child], is murder of the first degree; and all other kinds of murder are of the second degree." Penal Code, § 189.

Section 189 does not state that a "killing" perpetrated by one of the enumerated means is murder of the first degree. It speaks only of "murder" that is so perpetrated. In *People v. Coefield*, 37 Cal.2d 865, 236 P.2d 570, 572, the defendant, who had been convicted of murder of the first degree for a killing committed in the per-

petration of a robbery, pointed out that "murder" is the grammatical antecedent of "which" in the clause "which is committed in the perpetration or attempt to perpetrate * * * robbery," and contended that the killing was accidental and was therefore not with malice aforethought and was therefore not "murder" committed in the perpetration of a robbery, and accordingly was not murder of the first degree. We rejected this contention, holding not only that "malice is shown by the nature of the attempted crime, and the law fixes upon the offender the intent which makes any killing in the perpetration of or attempt to perpetrate the robbery a murder of the first degree" but that "in such a case the jury has no option but to return a verdict of murder of the first degree, whether the killing was done intentionally or accidentally." 37 Cal.2d at pages 868, 869, 236 P.2d at page 572. It is contended that since the poisoning or torturing of another or lying in wait to take him unawares involve substantial risk to human life, malice should also be found in the nature of such acts, and that a killing resulting therefrom should likewise be held to be murder of the first degree whether it was done intentionally or accidentally. Section 189, however, when read in the light of other sections of the Penal Code and the decisions of this court, is not amenable to that construction.

By the use of the phrase "or by any *other* kind of wilful, deliberate, and premeditated killing" (italics added) following the phrase "All murder which is perpetrated by means of poison, or lying in wait, torture," the Legislature identified murder committed by any of the enumerated means as a "kind of" willful, deliberate, and premeditated killing. Ordinarily, to prove that a killing was willful, deliberate, and premeditated, evidence must be introduced from which the trier of fact can determine the state of mind of the defendant before he committed the act that resulted in his victim's death, that is, whether the killing resulted from a deliberate intention to take human life.

If the killing is murder within the meaning of Penal Code sections 187 and 188, and

is by one of the means enumerated in section 189, the use of such means makes the killing as a matter of law the equivalent of a "wilful, deliberate, and premeditated killing". Since any question as to the defendant's willfulness, deliberation, and premeditation is taken from the trier of fact by force of the statute, *People v. Bernard*, 28 Cal.2d 207, 211, 169 P.2d 636; *People v. Murphy*, 1 Cal.2d 37, 41, 32 P.2d 635; see also the illuminating discussion in the early case of *Riley v. State*, 1849, 28 Tenn. 646, 660-661, it bears emphasis that a "killing" by one of the three means enumerated in the statute is not the equivalent of a "wilful, deliberate, and premeditated killing" unless it is first established that it is murder. Thus, if it is contended that a murder was committed by means of poison, it is not enough to show that a poison was administered and that a death resulted. If the poison was innocently given under the belief that it was a harmless drug and that no serious results would follow, there would be no malice, express or implied, and any resulting death would not be murder. *People v. Milton*, 145 Cal. 169, 170-171, 78 P. 549. If, however, the defendant administers poison to his victim for an evil purpose, so that malice aforethought is shown, it is no defense that he did not intend or expect the death of his victim. *People v. Cobler*, 2 Cal.App.2d 375, 380, 37 P.2d 869; see *People v. Bernard*, supra, 28 Cal.2d 207, 211, 169 P.2d 636. Similarly, in the case of a killing by torture, it is not enough to show that the killing was by a means that incidentally caused pain and suffering to the victim. *People v. Bender*, 27 Cal.2d 164, 177-178, 163 P.2d 8. It must be established that the defendant intended to "cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity." *People v. Tubby*, 34 Cal.2d 72, 77, 207 P.2d 51, 54;

People v. Daugherty, 40 Cal.2d 876, 256 P.2d 911; *People v. Martinez*, 38 Cal. 2d 556, 561, 241 P.2d 224. The defendant need not intend that his victim die as a result of the torture, since his intention to commit acts that involve a substantial risk to human life makes him guilty of first degree murder if a death results. *People v. Tubby*, supra, 34 Cal.2d 72, 77, 207 P.2d 51.

When it is contended that a killing is murder of the first degree on the ground that it was committed by lying in wait, it must likewise first be established that the killing was murder.² If the killing was not murder, it cannot be first degree murder, and it is immaterial that the defendant was lying in wait. Otherwise, absurd results might follow. Thus, a defendant might lie in wait to frighten a person. Unknown to defendant, that person might have a defective heart. His death from a heart attack as a result of the fright would not be murder. Again, a killing that unintentionally results from a fist fight is ordinarily involuntary manslaughter. *People v. Le Grant*, 76 Cal.App.2d 148, 152, 172 P.2d 554; *People v. Miller*, 114 Cal.App. 293, 301, 299 P. 742. If the defendant lay in wait for his victim to engage in a fist fight with him and the victim dies as a result of the fight, that fact alone is not sufficient to make it the equivalent of a "wilful, deliberate, and premeditated killing".

The instruction was also erroneous in stating that defendant was lying in wait if he was "waiting and watching and concealed from the person killed with the intention of inflicting bodily injury upon such person or of killing such person." When read with the last paragraph of the instruction, the foregoing language directed the jury to find defendant guilty of first degree murder if he intended "bodily injury." That definition falls short of the definition of murder in sections 187 and 188 of the Penal Code. It is true that

2. In the California cases involving murder by lying in wait, there was no contention that the killing was not murder; the only question was whether it was of the first or second degree. *People v. Bernard*, 28 Cal.2d 207, 169 P.2d 636 (victim struck with deadly weapon);

People v. Tuthill, 31 Cal.2d 92, 187 P. 2d 16 (victim shot with intent to kill); *People v. Vukich*, 201 Cal. 290, 257 P. 46 (same); *People v. Miles*, 55 Cal. 207 (same); *People v. Gibson*, 92 Cal.App. 2d 55, 206 P.2d 375 (victim stabbed).

murder may be committed without a specific intent to take human life if the killing is committed under circumstances that show an abandoned and malignant heart. To be so committed, however, the defendant must intend to commit acts that are likely to cause death and that show a conscious disregard for human life. See *People v. Torres*, 94 Cal.App.2d 146, 150, 210 P.2d 324 (striking victim with knife); *People v. Semone*, 140 Cal.App. 318, 324, 35 P.2d 379 (firing shotgun at trespassers); *People v. Hubbard*, 64 Cal.App. 27, 37, 220 P. 315 (shooting with intent only to wound); *People v. Stein*, 23 Cal.App. 108, 114, 137 P. 271 (firing shots at random into crowded dance hall). As we have seen in considering the first error discussed above, a mere intent to inflict "bodily injury," amounting to an assault and battery at most, would not be enough to constitute murder if a killing resulted therefrom.

From the foregoing discussion it is apparent that the instruction on lying in wait was defective largely because the court failed to explain that murder must first be established before the question of lying in wait can arise. Without such an explanation the instruction was not only misleading but a gross misstatement of the law. We would be compelled to hold that the instruction was prejudicial and resulted in a miscarriage of justice, if there was evidence in the record from which a reasonable jury could conclude that the killing was not murder. There is no such evidence.

Defendant confessed that he shot at Mrs. Bice for sexual pleasure. In one statement he said that she "had her coffee cup in her hand getting ready to drink her coffee which was what I was really aiming at * * * she had it right in front of her face." In another statement he said that he simply "aimed at the woman in the stand, and pulled the trigger and drove off." He said that he knew he was a poor shot. Under these circumstances there can be no doubt that malice must be implied and that the killing was murder. An intent to kill is not necessary for murder. Malice is implied "when the circumstances attending the killing show an abandoned and malig-

nant heart." Penal Code, § 188. That is shown when, as here, the defendant for a base, anti-social motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death. By his own admissions defendant's conduct demonstrates that he was not averse to endangering life for the sake of the sexual pleasure it gave him. Only a person with an "abandoned and malignant heart" could value the attainment of that pleasure more highly than human life. Since even if a proper instruction had been given, the jury could have come to no other conclusion than that the killing of Mrs. Bice was murder, the instruction did not result in a miscarriage of justice unless there was insufficient evidence to warrant the giving of any instruction on lying in wait.

We thus reach the crucial issue in this case: Was the evidence sufficient to warrant the giving of an instruction on lying in wait?

Lying in wait requires the elements of waiting, watching, and concealment for the purpose of taking a victim unawares. *People v. Tuthill*, 31 Cal.2d 92, 100-101, 187 P.2d 16; *Barnards v. State*, 88 Tenn. 183, 227, 12 S.W. 431. It does not mean that the defendant's body must be in a lying position; it is immaterial whether he is lying, sitting, standing, or moving about, so long as the elements of waiting, watching, and concealment are all present for the purpose of taking the victim unawares. *People v. Repke*, 103 Mich. 459, 468, 61 N.W. 861; *State v. Walker*, 170 N.C. 716, 718, 86 S.E. 1055. The defendant may either wait for his victim to come to his place of hiding or he may go to a hiding place near his victim and wait for a favorable moment to murder him. *People v. Repke*, *supra*, 103 Mich. 459, 468, 61 N.W. 861.

The duration of the waiting, watching, and concealment necessary to constitute lying in wait cannot be arbitrarily fixed in units of time, just as the time necessary for the ordinary willful, deliberate, and premeditated killing cannot be so fixed. There must, however, be substantial ev-

idence of a long enough period of waiting and watching in concealment to show a state of mind equivalent to premeditation and deliberation before the court can properly give an instruction on lying in wait. It is now settled that a mere specific intent to kill is not enough to constitute first degree murder under the classification of "any other kind of wilful, deliberate, and premeditated killing," and that there must be substantial evidence that the intent to kill was arrived at as a result of premeditation and deliberation. *People v. Holt*, 25 Cal.2d 59, 90-91, 153 P.2d 21; *People v. Thomas*, 25 Cal.2d 880, 901, 156 P.2d 7; *People v. Honeycutt*, 29 Cal.2d 52, 61, 172 P.2d 698; *People v. Valentine*, 28 Cal.2d 121, 131, 169 P.2d 1. If it is claimed that the murder was by one of the means enumerated in section 189, there must also be substantial evidence of the use of such means. Thus in the case of murder by lying in wait it is not enough that the victim be unaware of the presence of his assailant until the fatal wound is inflicted. It is also necessary that there be substantial evidence of the elements of waiting and watching. Otherwise a killing that was the result of a rash impulse would be converted into first degree murder.

In my opinion if the only evidence in this case was that with respect to the murder of Mrs. Bice, it would not be sufficient to sustain a finding of murder by means of lying in wait. Defendant saw deceased, a stranger to him, as he drove by in his automobile. He then drove round the block and parked in an alley in a position from which he could shoot at her. Standing alone, this evidence supplies no clue as to whether defendant was waiting and watching for an opportunity to shoot at any victim who might present herself, or formed the intent to shoot only after the opportunity presented itself. Moreover, the fact that after seeing his victim, he drove round the block and parked in a position from which he could shoot, is not, when considered by itself, evidence of lying in wait. His victim was then at hand. He did not drive round the block into the alley to watch and wait for her but only to enable him to shoot her. Any delay in doing

so after he had located his victim in an exposed position would not contribute to his success in executing his crime, but only increase the possibility that his victim might escape by moving from the area of danger. Thus unless defendant was watching and waiting for his victim before he came upon her, the murder was not committed by means of lying in wait.

The shooting of Mrs. Bice was not an isolated incident. On six other occasions defendant shot at women under similar circumstances. He carried his rifle with him in his automobile. His only motive for the shootings was sexual gratification. From this evidence the jury could reasonably infer that defendant drove about the city waiting and watching for whatever victims might present themselves. They could infer that he was waiting and watching for a victim on the night when he murdered decedent. Since in addition the murder was committed from a position of concealment, all of the elements necessary to constitute murder committed by means of lying in wait were present, and it was not error to present that theory to the jury.

EDMONDS, J., concurs.

SCHAUER, Justice.

I dissent.

Excepting his final conclusions, I agree with and adopt Justice TRAYNOR'S discussion and statement of the law as expressed in his concurring opinion. I do not agree that the evidence shows murder by lying in wait.

Furthermore, even if we accept the theory of lying in wait advanced in Justice TRAYNOR'S opinion, I do not believe the judgment of first degree murder can properly be sustained. It should not be sustained because no instruction so defining lying in wait was given to the jury and the record therefore fails to show—indeed it indicates the contrary—that the jury ever passed on the issues and found the facts essential to support the verdict on the theory described.

The evidence is ample to establish murder in the second degree and in my view

both the law and justice would be better served by reducing the judgment of conviction to murder of the second degree and, as so reduced, affirming it.

CARTER, Justice.

I dissent.

I cannot agree that the evidence is sufficient to support a judgment of murder of the first degree. The judgment cannot be sustained on the theory of lying in wait as the evidence falls far short of establishing this ground and the jury was not instructed on the law applicable thereto. The evidence is sufficient to support a judgment of murder of the second degree and I would modify the judgment accordingly and affirm it as so modified.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.



KEY SYSTEM TRANSIT LINES, a corporation, petitioner, v. SUPERIOR COURT of the State of California IN AND FOR ALAMEDA COUNTY, respondent.

S. F. 18924.

Supreme Court of California.

Sept. 22, 1953.

SCHAUER, Justice. (Dissenting to order denying writs.)

I would issue the alternative writs at this time and make them returnable for hearing on our calendar which is already set to be called the week of September 28, 1953, in the meantime staying proceedings in the court below.

I thus note my dissent from the order of the majority denying without opinion, and

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in legal effect without prejudice, the applications for the writs, because I am of the view that in the public interest this controversy should be finally disposed of on its merits at the earliest possible moment to the end that the concerned public transportation service should be resumed as soon as the machinery of government can lawfully bring that to pass, and that the delay of this court in accepting jurisdiction must inevitably tend to delay ultimate decision of the cause.

It appears to be unquestioned that the validity of the entire proceeding to which these applications for writs are directed depends upon one basic question of law, i. e., the jurisdiction and power of the superior court to make and enforce its order directing the petitioner here to resume normal operations and impliedly requiring petitioner to meet one or the other of the union's demands relative to increased rates of pay or arbitration.

Upon the showing here it appears that the above suggested basic question of jurisdiction—as among the superior court, the Public Utilities Commission, and the National Labor Relations Board—is a serious and substantial one and must eventually be decided by this court. It could be decided within a matter of days by issuing the writs applied for; their denial in the form of the majority order leaves the question open for decision at a later date upon subsequent proceedings and in the absence of some intervening fortuity which has not even been suggested serves only to delay the ultimate restoration of the involved transportation service.

The public interest and the rights of all parties concerned would, I believe, be better served by action at this time.

EDMONDS, J., concurs.

120 Cal.App.2d 316

**NISSEN et al. v. STOVALL-WILCOXSON
CO.****Civ. 8175.**District Court of Appeal, Third District,
California.

Sept. 21, 1953.

Hearing Denied Nov. 19, 1953.

Action against a corporation, from which plaintiffs purchased lands in an improvement district created within an irrigation district, for the amount of unpaid annual charges levied by the improvement district for maintenance and operation of its works and for construction of and declaration of defendant's obligations under its contract to sell the lands to plaintiffs, subject to defendant's agreement to pay all assessments of the improvement district until legally removed and defendant's subsequent contract to pay all assessments levied under such district's paid bonded indebtedness until dissolution of the district. From a judgment of the Superior Court, Colusa County, declaring defendant bound by the contracts to pay all assessments of the district until legally removed from the lands and awarding plaintiffs the amount of the unpaid maintenance and operation charges, defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the trial court's construction of the contracts was erroneous and that defendant was bound thereby only to pay all assessments levied under paid long term warrants, issued by the improvement district, until dissolution of the district.

Judgment reversed.

1. Waters and Water Courses ☞231

An instrument providing that corporation executing it agreed to pay all assessments levied under paid bonded indebtedness of improvement district, created within irrigation district, in consideration of purchase price paid for corporation's lands in improvement district by persons accepting, recording and retaining instrument, delivered to them by corporation, was binding on them, as well as corporation, though executed pursuant to statement in previous sale contract that purchase was subject to corporation's agreement to pay all assessments of improvement district until legally removed. Water Code, § 20500 et seq.

2. Contracts ☞177

Receipt and acceptance by one party to contract of papers signed by other party only and purporting to embody all terms of contract bind acceptor, as well as signer, by terms of paper.

3. Waters and Water Courses ☞231

A contract for sale of corporation's lands in improvement district created within irrigation district, subject to corporation's agreement to pay all improvement district assessments until legally removed, and corporation's subsequent written agreement to pay all assessments levied under improvement district's paid bonded indebtedness until dissolution of district, did not bind corporation to pay all assessments of improvement district until legally removed from lands, but bound it to pay only assessments levied under paid long term warrants, issued by district, until its dissolution, in absence of any bonded indebtedness of district. Water Code, § 20500 et seq.

4. Contracts ☞216

A promise will not often be properly interpreted as calling for perpetual performance.

5. Contracts ☞216

A contract will be construed as imposing obligation in perpetuity only when unequivocal language of agreement compels such construction.

Ralph W. Rutledge, Colusa, for appellant.

Virgil O'Sullivan, Colusa, for respondents.

VAN DYKE, Presiding Justice.

Defendant and appellant, Stovall-Wilcoxson Company, a corporation, owned real property situated in Improvement District No. 1, which is an improvement district created within the Glenn-Colusa Irrigation District, pursuant to provisions of the Irrigation District Act, Water Code, § 20500 et seq. The improvement district had planned certain proposed improvements, and, following statutory procedure, had levied an assessment on the lands within

its boundaries to pay the cost thereof. It had then issued long-term warrants against the assessment payable in ten annual installments, which were secured by the assessment which constituted a lien on the land. The improvement district also laid annual charges against the land for maintenance and operation of its works of improvement. On December 8, 1943, plaintiffs and respondents, L. J. and Ralph A. Nissen, negotiated for the purchase of some of appellant's land and the following receipt agreement was mutually executed:

"Williams, California
December 8, 1943

"Received of L. J. & R. A. Nissen, the sum of Five Hundred Dollars (500.00) as a deposit on the purchase price of [description of land], containing in all approximately 330 acres of land.

"Subject of [sic] the following conditions:

"Purchase price of \$75.00 per acre, acreage to be determined by actual survey. Cash for the balance of the purchase price on delivery of deed and policy of title insurance showing title to be clear and merchantable, said policies of title insurance and Survey to be paid by the seller.

"Subject to an agreement of the Stovall-Wilcoxson Company to pay all assessments of Improvement District No. 1 until such time as same are legally removed. Said bonded debt of said district being already (E.A.B.)

paid by said company. ~~Subject to immediate possession to the buyer.~~ (E.A.B.)

"Taxes and assessments of Glenn-Colusa Irrigation District to be prorated on passing of title.

"Stovall-Wilcoxson Company
By
E. A. Brim Manager"

In the following January the sale of the lands was completed and title thereto passed to respondents. At the same time appellant executed and delivered to respondents a written instrument which respondents accepted, recorded and retained. Omitting the introductory paragraph, that instrument contained the following:

"Said lands being included in the bonded indebtedness of the Glenn-Colusa Irrigation District and Improvement District No. 1 of said Irrigation District. It is understood and agreed that the bonded indebtedness of Improvement District No. 1 on said lands has been paid, and that the assessments thereunder will soon be removed, and legal steps are being taken to dislove said District.

"Now, for and in consideration of the purchase price paid for said lands, the party of the first part hereby agree to pay any and all assessments levied under said paid bonded indebtedness of said Improvement District No. 1 as said assessments are levied and payable, until said District is disloved."

[1,2] It is not disputed that this second instrument was executed responsive to the statement in the receipt agreement that the purchase was 'Subject to an agreement of the Stovall-Wilcoxson Company to pay all assessments of Improvement District No. 1 until such time as the same are legally removed'; and although various contentions are advanced concerning this second document as to its binding effect upon the respondents, yet it was clearly intended to be, and must be taken as, binding upon the parties accepting and retaining the same as well as upon the party that executed it. "'It is a settled rule that the receipt and acceptance by one party of a paper signed by the other only, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper.'" Dallman Supply Co. v. Smith-Blair, Inc., 103 Cal.App.2d 129, 228 P.2d 886, 888; Frankfort, etc., Ins. Co. v. Calif., etc., Co., 28 Cal.App. 74, 151 P. 176.

For several years, and without claiming it was not bound to do so, the appellant paid the annual charges for maintenance and operation levied by the improvement district. It then ceased to make such payments, and respondents, claiming that it was obligated thereto, brought this action to recover the annual charges not paid and to have the contracts construed by the court and the contractual obligations of appellant thereunder declared. The dispute be-

tween the parties centered around the question of what obligations to pay assessments of the improvement district the appellant was subject to. It was contended by the appellant that, if the documents were properly construed, it was under no obligation to pay maintenance and operation costs of the improvement district and that the language of the agreements referring to assessments referred only to the assessments securing the long-term warrants issued to defray the original cost of the district improvements according to its plan of improvement. These assessments appellant contended, and proved, had all been paid at the time it sold its land to respondents.

[3-5] The trial court received evidence concerning the circumstances accompanying the execution of the documents in question and of the acts of the parties thereunder before any dispute arose and thereafter declared that by the agreements the appellant had bound itself, without limit as to time, "to pay any and all assessments" of Improvement District No. 1 of whatsoever kind and character until the same are legally removed from the lands. The court gave a money judgment for the maintenance and operation charges which appellant had refused to pay. This appeal is from the whole of the judgment.

We think the construction placed by the trial court upon the written instruments involved cannot be upheld. It is not often that a promise will be properly interpreted as calling for perpetual performance. Wiliston and Thompson on Contracts, sec. 38. "A construction conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract". 17 C.J.S., "Contracts", § 398. "A contract will be construed to impose an obligation in perpetuity only 'when the language of the agreement *compels* that construction.'" Massachusetts Bonding & Ins. Co. v. Simonds-Shields-Lonsdale Grain Co., 226 Mo.App. 1071, 49 S.W.2d 645, 648.

Whatever of doubt there may have been as to the scope of the obligation to pay assessments as stated in the receipt agreement first executed between the parties hereto, the later agreement and the oral testimony as to the status of the district's

assessments against which its long-term warrants had been issued, dispel the same. It was without dispute that at the time the sale of the land was being negotiated the long-term warrants issued against the improvement assessments had all been paid. But it does not appear that anything had been done to relieve the land of the apparent lien of the assessments underlying the warrants. There never had been any bonded indebtedness of the improvement district. There had been an improvement and construction assessment for building the works contemplated by the district's plans and against this the long-term warrants had been issued. In reading the agreements, therefore, it is clear that "bonded indebtedness" must be read as referring to the long-term warrants secured by the underlying improvement assessment. The last agreement recited that the lands sold to respondents had been "included" in, that is, were burdened by, the bonded indebtedness of the Glenn-Colusa Irrigation District and also by the "bonded indebtedness" of the improvement district, but that this indebtedness of the improvement district, that is the long-term warrants, had all been paid and it was contemplated, said the contract, that "the assessments thereunder" would soon be removed; and further that legal steps were being taken to dissolve the district. Therefore, the appellant bound itself "to pay any and all assessments levied under said *paid* bonded indebtedness" until the district should have been dissolved. Clearly the undertaking was in the nature of a warranty by the appellant that if, notwithstanding its assurance that the warrants had been paid and the assessments underlying them were, therefore, innocuous, yet if it should occur that any demands were made thereunder the appellant would discharge them. Such a construction is, we think, the only one that fits the circumstances and the language of the instruments, and we think the construction adopted by the trial court does violence to the expressed intent of the parties.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

120 Cal.App.2d 329

PEOPLE v. NEAL.
Cr. 5020.

District Court of Appeal, Second District,
Division 1, California.
Sept. 22, 1953.

Prosecution for the sale and furnishing of heroin. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., found defendant guilty and pronounced sentence and defendant appealed. The District Court of Appeal, White, P. J., held that evidence sustained conclusion that defendant was willing to sell heroin and the fact that the enforcement officer became a willing buyer did not constitute entrapment.

Affirmed.

1. Criminal Law ⚖️37

If an accused has a pre-existing criminal intent, the fact that when solicited by decoy he committed a crime raises no inference of unlawful entrapment.

2. Criminal Law ⚖️37

There is no entrapment where offense committed is of a kind habitually committed, and the solicitation by an officer of the law merely furnishes evidence of the course of conduct.

3. Criminal Law ⚖️37

Where law enforcement officer was told by an informer that informer could arrange for officer to meet defendant and to buy narcotics from defendant, and officer furnished defendant with the opportunity to sell the narcotics, officer's act was not unlawful entrapment. Health and Safety Code § 11500.

4. Criminal Law ⚖️37

"Entrapment" is the conception and planning of offense by an officer and his procurement of its commission by one who would not have perpetrated it except for trickery, persuasion, or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

5. Criminal Law ⚖️569

In prosecution for sale of heroin evidence sustained conclusion that defendant

was willing to sell heroin and that law enforcement officer merely became a willing buyer. Health and Safety Code § 11500.

6. Criminal Law ⚖️1168(2)

In prosecution for sale of heroin, failure of prosecution to call informer, who had assisted officer in procuring evidence against defendant, so as to allow cross-examination of informer, and the granting of prosecution's motion to strike testimony of informer at preliminary hearing from record, was not prejudicial, in view of fact that prosecutor had attempted to secure presence of informer, and defendant had proceeded at trial without objection to informer's absence.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in Count I with a violation of section 11500 of the Health and Safety Code in that he did on or about December 15, 1951, sell and furnish a preparation of heroin. Count II alleged a violation of the aforesaid code section on or about December 24, 1951, in that defendant sold and furnished a preparation of heroin. The last-named count was dismissed by the court upon the people's election not to present any evidence as to the offense therein charged.

Following the entry of a plea of not guilty and waiver of jury, the prosecution's case as to Count I was by stipulation submitted to the court upon the transcript of the evidence adduced and the exhibits introduced at the preliminary examination. At the trial defendant testified in his own behalf.

Thereafter, the court found defendant guilty of the offense charged in Count I of the information. Motion for a new trial was denied and judgment was pronounced sentencing defendant to State Prison for the term prescribed by law.

From the judgment and the order denying his motion for a new trial, defendant prosecutes this appeal.

Epitomizing the factual background of this prosecution, there is evidence on behalf of the people that on December 15, 1951, Police Officer Nickens and an informer, Arthur Thornton, stationed themselves in front of a hotel on East Fifth Street in the city of Los Angeles. About 11 a. m. defendant approached the two, apparently pursuant to a previous arrangement between Thornton and himself. Thornton introduced Officer Nickens under a fictitious name to defendant and suggested, "If we are going to talk business, let's get inside off the street." The three then entered the hotel and went to Room 309.

In the hotel room, Officer Nickens and Thornton each produced \$150 and placed the money on the bed. Defendant picked up the \$300, stating that this amount was not enough, but that since Nickens and Thornton were starting as "dealers", he would let them have "it" for \$350, and that they could pay him the other \$50 when they had made a sale. Defendant agreed to deliver "it" in small bundles to facilitate resale. He also said that the next purchase would cost Nickens and Thornton \$400. An arrangement was made to meet later at a house on Fifth Avenue to consummate the transaction.

At about 10:45 the same evening Officer Nickens went to the Fifth Avenue address and entered the building. Shortly thereafter defendant and Thornton arrived. Appellant placed upon the bed a plastic bag containing 72 wrapped packages, each of which was filled with a white powdery substance, and said, "Here is your stuff, fellows." Defendant then stated that if Thornton and Nickens wanted "any more" for the holidays to let him know and that he would supply them.

As a result of this latter remark, Nickens and Thornton made a second purchase from defendant on or about December 22, 1951.

The packages delivered by defendant on December 15, 1951, were identified by a qualified chemist as containing heroin.

Defendant testified that on December 15, 1951, he was on Fifth Street when the aforesaid Arthur Thornton, referred to as "Tiny", approached him "in regards to obtaining some narcotics for him and I told him I didn't know whether I could get any or not, and he said, 'I figured because you were working with bail bonds that you come in contact with people that deal in narcotics and you can probably find some' and I said, 'Well, if I can I'll let you know'."

That Thornton then introduced defendant to a man by the name of "Turley" (who in fact was Officer Nickens). That the three of them went to Room 309 of the hotel where Thornton and "Turley" each gave him \$150, and "told me to do my best to try to get the stuff for them and I told them I would". That there were no narcotics in the room that morning. That in the evening of the same day defendant met Thornton who inquired of him "if he had done any good?" That he (defendant) replied "No", and thereupon returned the \$300 to Thornton. That later on the same evening Thornton asked defendant to "take him home". That when they arrived at Thornton's home the latter invited the defendant to come into the house. Defendant testified he accepted the invitation and when he entered saw "Turley" (Officer Nickens) there. That Thornton thereupon "came out with this package (containing the heroin) under his coat". Defendant testified that at no time did he have any narcotics in his possession or deliver any.

[1] It is first contended by appellant that his arrest constitutes entrapment as a matter of law and therefore voids the conviction. In this appellant is mistaken. As was said by this court in *People v. Schwartz*, 109 Cal.App.2d 450, 455, 240 P.2d 1024, 1027, quoted with approval by the Supreme Court in *People v. Roberts*, 40 Cal.2d 483, 254 P.2d 501, "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no

inference of unlawful entrapment (citations) * * *. The jury was warranted in inferring that appellant was not *persuaded or lured*, but that he willingly committed the offense charged against him and assumed the chance of apprehension." (Emphasis included.)

[2] And, as stated in 22 C.J.S., Criminal Law, § 45, page 102: "Especially is this true in that class of cases where the offense is one of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct".

[3] Succinctly stated, the situation with which we are here confronted is that a law enforcement officer was informed by Thornton that the latter could "make arrangements" for the officer to meet appellant and buy narcotics from him. Upon receiving this information the officer furnished appellant an opportunity to commit the offense charged. We are satisfied that this does not constitute unlawful entrapment as that term is known to the law.

[4] As was further said by this court in *People v. Schwartz*, supra, 109 Cal.App. 2d at pages 454 and 455, 240 P.2d at page 1027: "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. In other words, persuasion or allurements must be utilized to entrap. * * * In the instant case it appears that the officers merely employed a stratagem for the purpose of apprehending a person already engaged in criminal activities. Therefore, no case of unlawful entrapment is made out. In the case now engaging our attention, the possession of a contraband narcotic and the formation of the intent and purpose to violate the law existed before the officers became aware of the situation * * *. The arrangements made by the officers were designed only to apprehend appellant in the furtherance of his criminal enterprise. *Stein v. United States*, 9 Cir., 166 F.2d 851."

[5] In the evidentiary narrative we have herein set forth there is contained ample evidence to justify the trial court in

concluding that appellant was a willing seller of narcotics, and his conviction cannot be set aside merely because an enforcement officer and his agent became the willing buyers and simply created the opportunity for appellant to ply his trade.

There was evidence that appellant had ready access to the contraband heroin; that not only was he willing to make the sale for which he was convicted but he also volunteered to make a second sale to the officer. Appellant's obvious familiarity with the narcotics trade, coupled with his ability to produce a substantial quantity of heroin on short notice, all indicate beyond a reasonable doubt that he was not an innocent person who was induced to commit the crime charged by the trickery, persuasion or fraud of the officer. *People v. Gallagher*, 107 Cal.App. 425, 290 P. 504, relied upon by appellant does not aid him. That case merely holds that an accused is entitled to an instruction based upon the theory of his defense, provided such instruction correctly states the law and the defense is supported by substantial evidence. Other cases cited by appellant do no violence to the foregoing views herein expressed.

[6] Appellant next complains of and characterizes as prejudicial error the failure of the prosecution to call Arthur Thornton, the informer, as a witness, and making a motion to strike from the record the testimony given by Thornton at the preliminary examination for the asserted reason, "so that it could not be impeached". The veiled intimation of appellant is that the district attorney was thereby attempting to suppress evidence favorable to the former. Appellant's contention is not supported by the record. On the contrary, it appears that the district attorney fully cooperated with appellant's counsel in attempting to secure the presence of Thornton at the trial.

Upon several occasions when the case was called for trial, Thornton, who had been subpoenaed by the prosecution, failed to appear. On each such occasion a bench warrant was issued with the result that Thornton's presence in court was later obtained. However, on November 14, 1952,

which was the last calling of the case before the actual trial thereof, Thornton was absent, and at appellant's request the matter was continued to January 8, 1953. On the latter date, the record reflects that appellant apparently made no objection to the absence of the witness Thornton, and willingly proceeded to trial without him. Manifestly, no prejudice was suffered by appellant, because the testimony given by Thornton was stricken from the transcript submitted to the trial judge in support of the people's case.

Furthermore, the record reflects that when the district attorney offered a stipulation to submit the case of the people on the preliminary examination transcript and that the court "not consider that testimony (Thornton's) for any purpose whatsoever", and that the court issue a bench warrant for the arrest of the absent witness, appellant's counsel stated, "Accept the stipulation". Appellant's last-mentioned claim lacks substance here.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN, J., and ROBERT H. SCOTT, J. pro tem., concur.



120 Cal.App.2d 493

BALDWIN v. BALDWIN.

Civ. 19488.

District Court of Appeal, Second District,
Division 2, California.

Sept. 30, 1953.

Rehearing Denied Oct. 19, 1953.

Divorce proceedings wherein plaintiff moved for modification of interlocutory and final decrees to provide for support, counsel fees and costs. The Superior Court of Los Angeles County, Mildred L. Lillie, J., denied motion, and plaintiff appealed. The District Court of Appeal, Fox, J., held that when record contained no transcript of the evidence,

or anything which disclosed reason for denial of plaintiff's motion by trial court, it would be presumed that order of denial rested upon ample foundation.

Affirmed.

1. Appeal and Error ⇨1032(1)

The burden is on an appellant to show sufficient basis for the reversal of the order or judgment from which he appeals.

2. Divorce ⇨286

Where record on wife's appeal from order denying her motion to modify interlocutory and final decrees of divorce in such manner as to provide for her support, counsel fees and costs, contained no transcript of evidence or anything disclosing reason for denial of her motion by trial court, it would be presumed that there was ample foundation for court's order of denial.



Nathan Kline, Los Angeles, for appellant.

John E. Sisson, Los Angeles, for respondent.

FOX, Justice.

Plaintiff appeals from an order denying her motion to modify the interlocutory and final decrees of divorce so that they will provide for her support, her counsel fees and costs.

In her notice to the clerk plaintiff only requested that the following papers be incorporated in the record on appeal:

1. The judgment roll;
2. The notice of appeal;
3. All minute orders made in this proceeding;
4. All exhibits admitted in evidence;
5. Notice and request for clerk's transcript.

The minutes show plaintiff and defendant testified at the hearing and that one exhibit, viz., a property agreement executed by the parties on April 11, 1950 (more than three months after the final decree), was received in evidence. Plaintiff has not furnished us with any transcript of the evidence. The minutes only reveal the action

taken by the court. They do not disclose the reason for the denial of plaintiff's motion. Although plaintiff argues in her brief that the court erroneously disclaimed jurisdiction, there is nothing in the clerk's transcript to sustain her position.

[1,2] It is elementary that the burden is on an appellant to show sufficient basis for the reversal of the order or judgment from which he appeals. *Finnegan v. Finnegan*, 64 Cal.App.2d 109, 111, 148 P.2d 37; *Gossman v. Gossman*, 74 Cal.App.2d 233, 235, 168 P.2d 495. On the record before us there is no indication of error. *Utz v. Aureguy*, 109 Cal.App.2d 803, 806-807, 241 P.2d 639. We must therefore presume that there was ample foundation for the court's order. *McMahon v. Merrill*, 112 Cal.App.2d 454, 455, 246 P.2d 73.

The order is affirmed.

MOORE, P. J., and McCOMB, I. concur.



120 Cal.App.2d 389

SILVERTON v. FREE.

Civ. 4835.

District Court of Appeal, Fourth District,
California.

Sept. 25, 1953.

Proceeding for writ of mandamus to compel county clerk to dismiss action, without prejudice, as requested by the plaintiff. The District Court of Appeal, Griffin, Acting P. J., held that answer of the defendant did not seek such affirmative relief as to preclude plaintiff from dismissing, without prejudice.

Peremptory writ of mandate granted.

I. Dismissal and Nonsuit ¶19(1)

Where defendant's answer to plaintiff's complaint was in the form of general and special denial and prayer that plaintiff take nothing, and asked for costs and such further relief as court deemed

proper, the answer did not seek such affirmative relief as to preclude plaintiff from dismissing without prejudice. Code Civ.Proc. § 581.

2. Mandamus ¶43

Mandamus will lie to compel the dismissal of an action where the entry of the dismissal is not subject to any discretionary consideration, and the duty to enter dismissal becomes ministerial.

Stevenson & Richman, Los Angeles, for petitioner.

No appearance for respondent.

GRIFFIN, Acting Presiding Justice.

Petitioner, in a claimed representative capacity of Teamsters Local Union No. 898, brought an action in Imperial County against Valley Transit Cement Company, Inc., a corporation, et al., involving a labor complaint. Defendant in that action answered and denied both generally and specially the allegations of the complaint, and as a part of the prayer asked that plaintiffs take nothing by their complaint and asked for its costs of suit and for such further relief as the court may deem proper.

On June 24, 1953, before trial, the attorney for plaintiff gave written request to the County Clerk of that county, respondent herein, to dismiss the action as to all defendants, without prejudice. The clerk notified the attorney for plaintiff that since affirmative relief was sought in the answer "we ask you to obtain consent of counsel for defendant before dismissal is entered".

Petitioner brought this proceeding to compel dismissal by the respondent clerk according to the written request. After service of an order to show cause defendant and respondent failed to appear and contest the proceeding.

Section 581 of the Code of Civil Procedure provides that an action may be dismissed by plaintiff by written request to the clerk at any time before the actual commencement of trial, provided a counter-

claim has not been set up or affirmative relief sought by cross-complaint or answer.

[1] The answer thus filed did not seek affirmative relief within the meaning of that section. *Simpson v. Superior Court*, 68 Cal.App.2d 821, 158 P.2d 46; *In re Estate of Somers*, 82 Cal.App.2d 757, 187 P.2d 433; *Sullivan v. Compton*, 61 Cal.App.2d 500, 143 P.2d 357; *Lori, Ltd. v. Wolfe*, 85 Cal.App.2d 54, 61, 192 P.2d 112; *Jalof v. Robbins*, 19 Cal.2d 233, 120 P.2d 19.

[2] Mandamus will lie to compel the dismissal of an action where the entry of the dismissal is not subject to any discretionary consideration, and the duty to enter dismissal becomes ministerial. *People v. Superior Court*, 86 Cal.App.2d 204, 194 P.2d 571; *Kahn v. Smith*, 23 Cal.2d 12, 142 P.2d 13.

Let a peremptory writ of mandate issue as prayed.

MUSSELL, J., concurs.



In re WELCH'S ESTATE,*

FAIRCHILD v. ADAMS.

Civ. 19554.

District Court of Appeal, Second District,
Division 1, California.
Sept. 22, 1953.

Hearing Granted Nov. 19, 1953.

Proceeding by brother of testatrix to admit will to probate. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., rendered judgment denying probate of will and brother appealed. The District Court of Appeal, Drapeau, J., held that evidence supported verdict of jury denying probate of will on ground of undue influence.

Judgment affirmed.

I. Appeal and Error ⇨1002, 1015(2)

The weighing of conflicting evidence is the function of the jury, and is also the

* Subsequent opinion 272 P.2d 512

function of trial judge on motion for new trial.

2. Wills ⇨386

In a will contest, the function of District Court of Appeal is concluded when it determines from an examination of the record that there is substantial evidence upon which to rest verdict of jury and that there was no error in law upon trial of case.

3. Wills ⇨166(7)

In proceeding to admit will to probate, evidence that testatrix had desired to will her property to sister but after talking with brother she changed her will so as to make brother her sole beneficiary, that no one was present but brother and testatrix when testatrix made will presented for probate, and that brother did not call doctor for testatrix until just before she died, supported jury verdict of undue influence.

4. Wills ⇨160(1)

Fact that testatrix republished her will by codicil did not free will from taint of undue influence but was but one circumstance in whole case to be weighed by court and jury together with all other facts and circumstances.

5. Wills ⇨164(7)

Where will was contested on ground of undue influence, testimony of mortician as to condition of body of testatrix, was admissible to show domination by proponent over testatrix.

6. Wills ⇨164(7)

The mental and physical condition of a testatrix are facts to be considered on the issue of undue influence.

Robert A. Jarrott, Los Angeles, and LeRoy Thomas, South Gate, for appellant.

Austin, Austin, Jones & Chaffee, Compton, for respondent.

DRAPEAU, Justice.

Myrtle F. Welch died December 22, 1951. Her husband died before her, January 21, 1947. She had no children. Her heirs at law and next of kin were two brothers and a sister.

Arthur A. Fairchild, brother, presented her will and codicil for probate. The instrument was entirely in Myrtle's handwriting and on one sheet of paper. The will was dated February 27, 1947; the codicil was dated December 26, 1949. Myrtle was 68 years of age when she made the will; 70 when she made the codicil, and 72 when she died.

By the will Myrtle left all her property to Arthur. By the codicil she named him to be executor, without bond. Her property was of the approximate value of \$18,000.

Geraldine F. Adams, sister, contested the will and codicil. The issue was submitted to a jury. The jury found for Geraldine and against Arthur, on the ground of undue influence. Motions for judgment notwithstanding the verdict and for a new trial were denied by the court.

Arthur appeals from the judgment denying probate of the purported will.

When Myrtle's husband died, she asked Geraldine, her sister, to arrange for his funeral. This Geraldine did. Myrtle told Geraldine not to send word about the funeral to Arthur.

The sisters agreed to live together in Geraldine's house in Long Beach. Myrtle listed her house in Compton for sale with a real-estate broker.

While these friendly relations between the sisters continued, Myrtle made her handwritten will, leaving to Geraldine all her property except \$6,500, which was to be held by Geraldine as trustee for Arthur. At the same time Geraldine made her handwritten will, giving Myrtle the use of Geraldine's house (not exclusively) for life, with the residue of Geraldine's estate to go to one of her sons. These wills were dated January 28, 1947.

While the two sisters were packing Myrtle's things to move to Geraldine's house, Arthur appeared. He said on the trial that this was in response to a letter from Myrtle, asking him to come. But he did not produce the letter. Geraldine testified that she saw the letter before it was mailed, and that it asked Arthur to come and get his things out of the garage.

Anyhow, when Arthur came the big fight began. Geraldine testified that the first thing Arthur said was, "Now, Fred is gone. You will have to change your will. You will me everything you have and I will will you everything I have."

Then Arthur pleaded with Myrtle to stay where she was and to make a home for him. Geraldine had a tantrum. Myrtle and Arthur went for a ride in his car, to talk things over.

When they got back, Arthur told Geraldine, "take your things out of here. I am going to stay with Myrtle."

Myrtle beckoned Geraldine out into the yard. Myrtle said, "I have stood all I can stand of fighting. You will just have to do as he says. You know he is so domineering, you will just have to do as he says."

Geraldine said, "I thought you asked me to stay here and protect you like Fred did?"

Myrtle said, "I tell you I will stay here until he gets his things out of the garage, then I will ease him out without fighting. You know it takes patience with people like him. I will figure out a way to ease him out. So you go on and I will keep in touch with you, and let you know what to do next."

So Arthur came to live with Myrtle in Myrtle's house. He cancelled the real estate listing, and lived with his sister until she died.

And so, within a few weeks after Arthur moved in, Myrtle made the will presented for probate. And, later, she made the codicil presented for probate. Arthur was present when both the will and the codicil were made. No one else was present but Myrtle and Arthur.

Soon after Arthur came to live with Myrtle he made and gave to her a codicil to his will, leaving her \$7,000. When she made her will to him he made his will, leaving her \$25,000. Contestant argues that Arthur's property, however, consisted mainly of mining claims of doubtful value.

Contestant's theory of the case was that Arthur forced his way into Myrtle's home,

subjecting her to his will, even though she had agreed to live with her sister; that within a few weeks he again substituted his will for hers, and dictated the testamentary disposition of her property to him; that he dictated the codicil in the same way; that at all times until she died he kept her under subjection in her home, and kept her friends and relatives away from her; and, finally, that he heartlessly and shamefully neglected her on her death bed.

It is in testimony that about two weeks before Myrtle died Arthur went to a mortician and arranged for her body to be disposed of for \$77, just a burial, no funeral; that the mortician told him he should call a doctor, who would thus be able to sign a death certificate; that Arthur did not call the doctor until just a few hours before Myrtle died; that the mortician found Myrtle's body, filthy and emaciated, in a filthy bed; that when the relatives heard of Myrtle's death, they arranged a proper funeral for her at their own expense, which funeral Arthur did not attend.

Proponent's theory was that Myrtle asked him to move into her house to protect her from Geraldine and the rest of the relatives; that Geraldine had already gotten Myrtle's car away from her; that he did not talk about wills at the time of his interview with Myrtle after her husband's death; that he did not take her for a ride before Geraldine was ordered out; that for the rest of her life he did protect his sister from the designs of her relatives; that it was at her direction that he did not call a doctor during her last illness, or send her to a hospital, or have nurses for her; and that the will and the codicil presented for probate were of her own free will and accord, without any influence upon her by him.

[1] While perhaps such inferences as proponent contends for might have been drawn by the jury, the verdict was against him. And he may not prevail on appeal. For it is settled law that this Court is not empowered to weigh conflicting evidence. That is the function of the jury, and, on a motion for a new trial, of the trial judge.

[2] *The function of this Court is concluded when it determines from an examination of the record that there is substantial evidence upon which to rest the verdict of the jury, and that there was no error in law upon the trial of the case. In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; In re Estate of Snowball, 157 Cal. 301, 107 P. 598; and see any number of cases to the like effect, digested in 45 West's California Digest, Wills, §386, p. 561.

[3] The record in this case has been read with care. It shows that the evidence does support the verdict of the jury when the foregoing rules are applied, and that there was no error in law upon the trial.

[4] Republication of the will by the codicil was but one of the circumstances in the whole case to be weighed by the court and by the jury, together with all the other facts and circumstances. Therefore, appellant's contention that, as a matter of law, the codicil freed the will from any possible taint of undue influence is without merit.

Asserted errors in the admission of evidence, in giving an erroneous instruction, in modifying certain instructions, and in refusing certain other instructions offered by proponent have been examined and considered. No error is apparent. Reading the instructions as a whole, the jury was fully and fairly advised of the law to be applied to the facts in the case.

[5, 6] Appellant lays particular stress upon the admission over his objection of evidence as to the condition of the body of decedent as testified to by the mortician. Without doubt this evidence was highly prejudicial to appellant's case. But it was competent to show the complete domination by Arthur over his sister, even when she was within hours of her death. Indeed, on the very day she died Arthur refused to permit his other brother even to see her. The mental and physical condition of a testator are facts to be considered on the issue of undue influence. In re Estate of Teel, *supra*.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 335

**ROSENBLUM v. WESTERN AUTO
TRANSPORTS, Inc. et al.**

Civ. 4583.

District Court of Appeal, Fourth District,
California.

Sept. 22, 1953.

Action for damages for injuries and wrongful death that occurred following the collision of plaintiff's automobile and automobile approaching from opposite direction which was in process of passing defendant-trucker. The Superior Court of Imperial County, Elmer W. Heald, J., entered judgment for defendants and plaintiff appealed. The District Court of Appeal, Griffin, Acting P. J., held that where plaintiff's attorney agreed to "look up the law" and rephrase a hypothetical question but failed to prepare further hypothetical question, record was insufficient to raise question upon appeal.

Judgment affirmed.

1. Appeal and Error ⇨500(3)

In order that an aggrieved party may have his point of grievance considered on appeal, the record must show the action of the court below in admitting or rejecting the matter of proof.

2. Appeal and Error ⇨500(3)

An objection to a ruling of the trial court on evidence will not be entertained if the transcript on appeal does not disclose that the ruling objected to was made.

3. Appeal and Error ⇨242(4)

Where plaintiff's attorney agreed that he would rephrase hypothetical question asked of his expert witness but failed to do so, and there was no ultimate ruling by court, record was not sufficient to raise the question upon appeal.

4. Appeal and Error ⇨1048(7)

In action for damages for injuries and wrongful death that occurred following the collision of plaintiff's automobile and automobile approaching from opposite direction which was in the process of passing defendant-trucker, refusal to allow plaintiff to impeach truck driver, who testified that collision was only partly head-on, by use of driver's statement after the collision that collision was head-on was not prejudicial

error, especially in view of fact that statement was stipulated into evidence.

5. Witnesses ⇨331½, 390

Impeaching testimony must be relevant and material to the issue tried and inconsistent with the prior statement.

6. Appeal and Error ⇨1060(1)

Where defendants' counsel in his argument to jury stated that the accident involving plaintiff's automobile and defendant's truck and automobile of a third party would never have happened if third party had not used poor judgment, and defendants' answer denied that negligence of third party and trucker operated jointly to cause injuries, refusal to permit plaintiff to read portions of answer of truck owner which were alleged to be contrary to argument, were not prejudicial error.

Wolf & Rubins, Los Angeles, for appellant.

Sturdevant & Kimball, El Centro, for respondents.

GRIFFIN, Acting Presiding Justice.

The complaint alleges a cause of action on behalf of plaintiff Jerry Rosenbloom, individually and as special administrator of the estate of Eva Rosenbloom, deceased, to recover damages for personal injuries and property damage sustained by him, and for the wrongful death of his wife, Eva Rosenbloom, against Western Auto Transports, Inc., its driver and employee, Bernard J. Weaver, and Julius Hilfiker, executor of the estates of Samuel Hilfiker and Rosa Hilfiker, deceased, arising out of a claimed three-car collision on April 6, 1950, on U. S. Highway 80, near Plaster City. It alleged that Jerry Rosenbloom was driving his DeSoto automobile in a westerly direction; that his wife was riding with him; that the Hilfikers were operating their Chevrolet automobile in an easterly direction; that Weaver was driving a Dodge tractor-trailer owned by Western Auto Transports, Inc., also in an easterly direction. It charged that all these defendants so negligently operated their vehicles as to allow the Dodge tractor-trailer to

collide with the Chevrolet, thereby causing the Chevrolet to collide with plaintiff's automobile; that as a result Eva Rosenbloom and both Hilfikers were killed and Jerry Rosenbloom was injured.

The executor of the Hilfiker estates appeared by answer and denied generally and specifically the allegations of negligence, and the action was subsequently dismissed by plaintiff, without prejudice, as to such executor. Defendant and respondent Western Auto Transports, Inc., and its driver appeared separately and denied generally and specifically the allegations of negligence against them. The case proceeded to trial against the respondents. A jury verdict was rendered in favor of defendants and respondents. Plaintiff's appeal is predicated upon claimed error of the court in refusing certain testimony and in disallowing plaintiff's attorney the claimed right to read certain paragraphs of the pleadings to the jury.

The evidence shows that at the time of the accident it was a clear day in April, the pavement was 20 feet wide with 8 to 10 foot shoulders and marked with a white center line. Plaintiff was driving his DeSoto in a westerly direction on the northerly side of the highway about 40 to 50 miles per hour. Approaching from the opposite direction and traveling east were three vehicles, one, a highway maintenance jump truck traveling about 35 to 40 miles per hour; two, a Chevrolet automobile driven by Hilfiker, which had overtaken and had just passed the third vehicle, a 45-foot long Dodge tractor-trailer driven by Weaver, an employee of defendant Western Auto Transports, Inc., traveling about 45 to 48 miles per hour.

The evidence shows that when Weaver was about 500 feet behind the highway maintenance truck the Chevrolet was overtaking him, and when he was about 200 feet from the highway maintenance truck the Chevrolet passed Weaver's truck on his left or in the westbound traffic lane of the highway at about 60 miles per hour, and while the truck and trailer were in the eastbound lane about 6 inches south of the center line. The evidence further shows that Weaver intended to pass the highway

maintenance truck which was then about 200 feet ahead of him, but due to a slight curve in the road to his right that truck obstructed his view of approaching traffic from the East.

Weaver testified that when the Chevrolet was about 150 feet ahead of him the westbound DeSoto driven by plaintiff endeavored to pass the highway maintenance truck; that Weaver realized there was going to be a collision between the Chevrolet and the DeSoto since they were traveling in opposite directions in the westbound lane; that he applied the brakes to his Dodge truck and trailer and pulled to his right; that at the time the DeSoto was about to pass the highway maintenance truck the Chevrolet started to angle to the south and the right side of the Chevrolet moved south across the white center line about 1½ to 2 feet when it suddenly swerved and turned toward the north and the impact between it and the DeSoto occurred in the westbound lane of traffic; that the right front section of the Chevrolet came in contact with the left front section of the DeSoto; that upon the impact the Chevrolet spun counterclockwise, in a complete turn, and was still in motion when defendant's tractor-trailer reached that point; that the Chevrolet passed on the left side of the tractor-trailer at a distance of about 2½ feet from its left side, and never came closer to it prior to the impact. He then testified that the tractor-trailer stopped with the front of the tractor directly south of the point of impact and that when the brakes were applied the tractor did turn somewhat to the north; that jackknifing of the trailer occurred and it moved to a point about 12 inches to the north and came to a stop with the tractor heading in a southerly direction and extending diagonally back to the center line of the highway.

A paint mark appeared on the rear of Weaver's left front fender 4 or 5 feet behind the front bumper on the tractor, and a small dent was made in the left running board which Weaver assumed was made by the Chevrolet when it spun around after the impact with the DeSoto. There were no marks on the trailer.

Plaintiff testified he first saw the Chevrolet approaching him in the westbound traffic lane at a distance of 350 feet; that at that time it was about 50 feet behind the highway maintenance truck and 40 to 50 feet ahead of the tractor-trailer; that he sounded his horn, applied his brakes, and angled his car toward the north shoulder; that the Chevrolet driver angled his car to the south; that the Chevrolet spun around suddenly in a complete reverse direction and the right front fender and side of the Chevrolet struck the left front fender and side of the DeSoto; and the defendant's truck and trailer were to his left directly across from plaintiff's DeSoto. The Chevrolet skid marks extended a distance of 120 feet. The skid marks of defendant's truck and trailer measured 180 feet.

The driver of the highway maintenance truck testified he heard the screech of brakes and then, through his mirror, saw the Chevrolet and tractor-trailer behind him, and that the Chevrolet was at that time "very slightly" ahead of the tractor-trailer; that he saw the Chevrolet "hurtle due north" towards its left and collide with the DeSoto on the north side of the road; and that it was not a "head-on" collision.

An officer stated that Weaver told him that the running board of his tractor did come in contact with the Chevrolet, according to the dents on his running board.

It was plaintiff's contention at the trial that defendant's tractor did strike the Chevrolet before the Chevrolet came in contact with the DeSoto, and that this external force caused the Chevrolet to whirl around suddenly in the opposite direction and strike plaintiff's car. It was defendant's position that the impact between the Chevrolet and the DeSoto took place approximately 150 feet ahead of defendant's tractor and that if the tractor did come in contact with the Chevrolet, it was after the collision with the DeSoto.

In support of his contention, plaintiff produced a witness who qualified as an expert physicist and was prepared to answer a hypothetical question posed to him as to whether or not it was physically possible for the Chevrolet to have turned around in

the manner indicated without the application of an external force. Defendant's counsel objected on the ground that it was not a proper subject of expert testimony, and that the ultimate question and answer was the issue to be decided by the jury. It is in reference to this ruling that plaintiff makes his first point.

In ruling on the objection the court said: "I am going to sustain the objection. The evidence is before the jury; they don't need another witness to come here to testify now as to what is on this photograph (a photo showing the relative position of the several vehicles involved, the skid marks, etc.) I have allowed him to give his expert opinion on matters which I think is to the point of impact, that is something that the inexperienced person might not be able to tell * * * but when we get into all these tire marks that are on this board, it is just as the witness has said, it is not possible to tell." Counsel for plaintiff then remarked: "I will ask it another way; I will withdraw the ultimate question." He then reframed the question and the same objection was made, together with the objection that the law did not permit an expert to testify how an automobile accident happened by presenting a hypothetical question to an expert witness based only upon certain evidence of skid marks, photographs of the respective cars, and a diagram made by several witnesses, particularly where there were other factors in the evidence that were not considered in the question. No ruling was made upon this objection. Counsel for plaintiff then stated: "I would like to make an offer of proof". The jury was dismissed for the purpose of making the offer of proof. Considerable argument ensued. The court then suggested and plaintiff's counsel agreed that he would "look up a little law on it" and prepare a hypothetical question "incorporating all the facts desired." The witness was later allowed to express an opinion as to the proximate time it would take the tractor-trailer, as evidenced by the skid-marks, to travel 180 feet, and as to the radius in which a 1949 Chevrolet could ordinarily turn. The record does not show that counsel for plaintiff subsequently pre-

pared any further hypothetical question incorporating any other facts desired, nor that the witness was recalled for the purpose of giving any further testimony.

[1-3] It is apparent from the record that all the elements or factors desired to be established were not included in the hypothetical question, as stated; that counsel for plaintiff agreed to prepare a proposed new hypothetical question on the subject but failed to do so, and that there was therefore no ultimate ruling to which plaintiff could object. Even if the testimony sought to be produced under a proper hypothetical question was admissible, which we do not here decide, in order that an aggrieved party may have his points of grievance considered on appeal, the record must show the action of the court below in admitting or rejecting matters of proof. 3 Cal.Jur.2d p. 803, sec. 268. An objection to a ruling of the trial court on evidence will not be entertained if the transcript on appeal does not disclose that the ruling objected to was made. *Wallace v. Maples*, 79 Cal. 433, 21 P. 860; *Campbell v. Genshlea*, 180 Cal. 213, 180 P. 336; *Kentera v. Kentera*, 66 Cal.App.2d 373, 152 P.2d 238; *Pedrow v. Federoff*, 77 Cal.App. 164, 247 P. 212.

In addition, no prejudicial error appears in this respect because the witness did testify to some extent on the subject. He stated: "Well, that damage there may or may not be a retarding force type of damage, * * * The car was hit on the right side by the truck, which was going in the same direction; that would not be a retarding force; that would be an additional propelling force."

[4,5] The second point involves claimed error of the court in refusing to permit plaintiff's attorney to cross-examine defendant Weaver in reference to a certain claimed statement he made to a traffic officer after the accident occurred. He was asked if he did not tell the officer it was a "head-on" collision between the Chevrolet and the DeSoto. After objection, the court remarked to counsel for the plaintiff: "Well, if you have the statement there and he made that statement, you may show it to him, and ask him if he made that statement

at that time and place. By Mr. Rubins: We don't have it here, Officer Tackett has it. By the Court: I will sustain the objection." Counsel for plaintiff then suggested that the question pertained to an oral statement and not a written statement. The court then offered a suggestion to plaintiff as to the manner in which the witness might be impeached by first showing him his written statement. There apparently was some confusion between the court and counsel as to which statement counsel was inquiring about. We see little merit to this contention. Just what constitutes a "head-on" collision might be subject to different interpretations of the evidence, and no materiality is shown if it was established that Weaver concluded that it was a "head-on" collision and so stated. The statement of the witness at the trial was, when asked if this was a head-on collision as he saw it: "Pretty much. * * It wasn't directly head-on inasmuch as it wasn't a direct head-on impact. One was to the left side of the car and the other was to the right part of the car." It should be further noted that subsequently the signed statement by Weaver was stipulated into evidence and its contents was placed before the jury. In that statement the witness did refer to it as a "head-on" collision. In addition, plaintiff was permitted to show that Weaver had testified in a deposition that this was a head-on collision. Any claimed impeaching testimony must be relevant and material to the issue being tried and inconsistent with the prior statement. 27 Cal. Jur. 152, sec. 125. No prejudicial error resulted.

The third and last point is in respect to the argument to the jury by counsel for defendants when he stated: "We feel * * that the tractor had no contact with that Chevrolet prior to the time of impact * * that had it not been for the poor judgment of the driver of the Chevrolet in attempting to pass two vehicles on a curve, there would have been no accident."

[6] In reply, counsel for plaintiff sought to answer this argument and stated that defendants never before claimed Hilfiker, the driver of the Chevrolet, was negligent, and sought to read to the jury certain para-

graphs of defendant's answer which plaintiff thought so alleged. The court disallowed this procedure. Error is claimed in this respect. Examination of defendants and respondents' answer shows that Weaver and the Western Auto Transports, Inc., appeared separately from the Hilfikers, and separately denied each allegation of plaintiff's complaint insofar as they were concerned, and particularly denied the allegation of plaintiff's complaint to the effect that the negligence of each defendant operated jointly and caused plaintiff's injuries. There is no allegation therein that the Hilfikers were or were not negligent. No prejudicial error resulted from the ruling of the trial court.

Judgment affirmed.

MUSSELL, J., concurs.



120 Cal.App.2d 423

ASSOCIATED INDEM. CORP. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8403.

District Court of Appeal, Third District,
California.

Sept. 28, 1953.

Workmen's compensation proceedings brought by widow of a deceased employee who allegedly suffered heart failure from over exertion while digging a pit, resulting in coronary occlusion causing death. The Industrial Accident Commission awarded compensation and a proceeding was brought by the Commission and another, to review such action. The District Court of Appeal, Van Dyke, P. J., held that evidence justified finding that decedent suffered an injury which was proximately caused by his employment.

Award affirmed.

1. Workmen's Compensation ⇨554

An employee is entitled to compensation for disability proximately caused by

261 P.2d—2½

industrial injury regardless of whether employee's condition at time of injury was average or subnormal, thus aggravation of existing infirmity, when such aggravation is proximately caused by employment, is compensable, though a normal man would not have been adversely affected.

2. Workmen's Compensation ⇨556

Death of employee which evidence shows and Industrial Accident Commission finds was hastened or produced by industrial injury is compensable, notwithstanding showing that employee would have ultimately died from pre-existing disease.

3. Workmen's Compensation ⇨1358

In workmen's compensation proceedings claimant has burden of proving that injury arose out of and in course of employment and was proximately caused thereby.

4. Workmen's Compensation ⇨1546

In workmen's compensation proceedings brought by widow of a deceased employee who allegedly suffered heart failure from over exertion while digging a pit, resulting in coronary occlusion causing death, evidence justified finding that decedent suffered an injury which was proximately caused by his employment.

Mullen & Filippi, San Francisco, for petitioner.

Chapman & Nichols, San Francisco, for respondent Johnson.

Edmund J. Thomas, Jr., T. Groezinger, San Francisco, for Industrial Acc. Com.

VAN DYKE, Presiding Justice.

The widow of Hobart Johnson filed her application for adjustment of claim with respondent Commission. She alleged that on December 9, 1951, while employed as a laborer by the Trask Company, Johnson had suffered "heart failure from over exertion" while digging a pit, "resulting in Coronary Occlusion causing death." The respondent Commission awarded her compensation and this proceeding was brought to review that action.

The following appears: Decedent had been in apparent good health prior to the

date of his death. He had not been attended by a doctor for illness of any kind during the preceding five years. He was employed five days per week as a janitor for another employer and on Saturdays and Sundays he worked for the Trask Company. Decedent did not complain of aches or pains while working on the day he died. Decedent, with his employer, left San Francisco in the morning and proceeded to Modesto where they did further digging in a pit 9 feet long by 5 feet wide which had been partially dug. They alternated working in the pit at about 15 minute intervals. They were digging the pit with hand shovels, one shoveling the dirt from the pit bottom to the surface, the other shoveling it from there into a small truck. When the truck was filled they drove about five miles to a dump where they shoveled the dirt out of the truck. The elapsed time from pit to dump was about 25 minutes. They had made three trips and had returned when decedent got into the pit, picked up his shovel, commented there was only about a foot and a half more to be dug, collapsed and died. The death certificate gave the cause of death as "Coronary occlusion, arteriosclerosis of coronary arteries with atheromatous degeneration of blood vessel walls."

Doctor Ransom, Coroner of Stanislaus County, said that the autopsy "showed the customary hardening of the arteries over the entire system" extending "to the blood vessels supplying heart muscle." He said he found a coronary occlusion; and a diseased area where the occlusion took place; that there was "atheromatous degeneration and thickening and shrinking of the lining of the artery"; and that the coronary artery at the place of the occlusion was considerably smaller than normal. He found that the final occlusion was caused by little crusts from the atheromatous lining of the diseased artery. He testified that the development of arteriosclerosis took a long period of time; that he had known of people so afflicted falling dead while walking on the street, or who were working, driving or who became scared; that he considered shoveling hard work.

[1-3] On the issue of causation the witness was vague, but he said that with the existing arterial condition the exertion of shoveling would be a factor in the occlusion, though a minor one. Doctor Gianelli, petitioner's witness, said there was nothing abnormal in the work the decedent had been doing; that a normal person doing that work would not have died therefrom; that exercise has a direct effect on the expanding and contraction of the arteries in the area of the heart and increased the demand for blood supply to the heart muscle fibres; that decedent's activities were not more than a normal being could withstand and that one who died thereunder could have died any other time "in the middle of the night, after a large meal, after a period of emotional stress and strain—any of those factors could have been the precipitating event." The following appears in the transcript: "Q. The question is * * * did this exertion on this man with this arteriosclerosis play any part in his death at that time. * * * A. I will have to answer yes to that. * * * It had a dual effect: One, it had the effect of increasing the demand for blood by the heart muscle, the reason for that being that the heart muscle had to work harder because he was working harder and the demand for oxygen was increased. The oxygen is carried by the blood; therefore, more blood was needed for a given period of time. The increased blood flow could agitate this material that had hardened the artery and in agitating it could have loosened it and caused it to break off and block, pile up and block a vessel." He said that this effect could have been caused by any normal activity such as eating meals or walking a block; that just the process of existing which demands oxygen consumption "is enough of a stimulus to have caused it"; and that he had known many individuals with such a heart condition to die while sleeping in bed. There is nothing in the record to indicate the occurrence of any hurrying or any sudden strain or stress or to indicate that the shoveling which the decedent had been doing was under abnormal conditions requiring great or long sustained exertion. The

man was shown to have been normally doing the work he was hired to do.

"* * * It is now too well settled in this state to require extended citation of authority that the employee is entitled to compensation for disability proximately caused by industrial injury regardless of whether the employee's condition at the time of injury was average or subnormal. Thus, an aggravation of an existing infirmity where such aggravation is proximately caused by the employment is compensable, even though a normal man would not have been adversely affected. This rule applies even though it is shown that the employee would have ultimately died from such disease, if the evidence shows and the Commission finds that the injury hastened or produced his death. * * * Industry takes the employee as it finds him. A person suffering from a pre-existing disease who is disabled by an injury proximately arising out of the employment is entitled to compensation even though a normal man would not have been adversely affected by the event.

"* * * The burden of proof that the injury arose out of and in the course of the employment, and was proximately caused thereby is on the employee. * * * It is obvious that whether the employment proximately precipitated the collapse of a pre-existing diseased heart and proximately caused it to collapse before normal progressive developments would have resulted in the collapse is a question of fact." *Liberty Mutual Ins. Co. v. Industrial Accident Commission*, 73 Cal.App.2d 555, 558-559, 166 P.2d 908, 911.

[4] The facts of this case in the light of the applicable rules of decision which we have stated furnish substantial support for the finding of the Commission that Johnson suffered an injury which was proximately caused by his employment. Although he was afflicted with general arteriosclerosis which, at the point where the final occlusion occurred, was far advanced, so that death would have occurred in time from the normal progress of the disease, yet the exertion which the performance of his work called for increased the hazard of final occlusion which occurred and

which caused his death. The exertion was sufficient, according to the expert testimony, to have brought about, by means of the increased contraction and expansion of the artery and the accelerated blood flow, a dislodging of particles from the diseased lining, causing a block. This the autopsy surgeon found had occurred, and caused the fatal occlusion. The experts testified that this exertion could have had the effect that the autopsy disclosed. That is sufficient support for the finding of the Commission as to proximate cause.

The award is affirmed.

PEEK and SCHOTTKY, JJ., concur.



120 Cal.App.2d 383

In re KESSLER'S ESTATE.

WALKER et al. v. KESSLER.

Clv. 19566.

District Court of Appeal, Second District,
Division 2, California.

Sept. 25, 1953.

Rehearing Denied Oct. 14, 1953.

Hearing Denied Nov. 19, 1953.

Action on petition filed by trustees alleging that minor beneficiary's father was interfering with their carrying out of trust by his refusal to permit trustees, who were also grandparents of beneficiary, to visit beneficiary to ascertain her welfare, and to permit funds from trust to be expended for her support and benefit. The Superior Court of Los Angeles County entered judgment denying trustees the right to visit beneficiary over objection of father and trustees appealed. The District Court of Appeal, Fox, J., held that it was necessary for trustees to see and talk with beneficiary in order to have basis for determining what expenditures would be for her benefit.

Reversed with directions.

1. Trusts 171

Where father of minor beneficiary of trust was allegedly interfering with trustee's efforts to carry out trust, fact that

trustees were maternal grandparents of beneficiary would not militate against their right to perform their duties under trust.

2. Trusts ⇨271

Where trust was set up for minor beneficiary, income to be used for her care and education until she was thirty years old at which time trust estate was to be turned over to her, fact that fewer payments of income would result in accumulation in trust and an enlarged estate when she was thirty would not justify court order denying right to trustees to visit her to determine her needs.

3. Trusts ⇨271

Where trust was set up for minor beneficiary, with directions to use income for her care and education, but beneficiary's father refused to allow trustees to visit beneficiary, a court of equity would take jurisdiction and assist in carrying out the trust by granting trustees the right to visit beneficiary notwithstanding the objections of the father.

4. Trusts ⇨271

Where trust was set up for minor beneficiary, and payments were to be made only in sole discretion of trustees, although decree establishing testamentary trust gave trustees right of visitation through an agent, trustees were entitled to personally visit beneficiary, since trustees were not required to rely on hearsay information and opinions of others in exercising their discretion.

5. Trusts ⇨169(2), 176

Where decree establishing testamentary trust authorized trustees to appoint some one in their place to carry out terms of trust if they failed to qualify or were unable to act, the provision furnished method for appointing trustees in event those named either failed to qualify or became unable to serve, and did not authorize trustees to delegate exercise of their discretion to agents. Probate Code, § 1126.

Nicholas & Mack, A. F. Mack, Jr., and Max G. Kolliner, Los Angeles, for respondent.

FOX, Justice.

Mrs. Dorothy Walker Kessler died in Arcadia, California, in April, 1946. She was survived by her daughter, Karen, then aged three, and by her husband, Howard M. Kessler. By her will Mrs. Kessler provided for a trust for the use and benefit of her daughter, with Mr. and Mrs. Fred Walker, parents of Mrs. Kessler, as trustees. The will was admitted to probate and in due course the trust was established. In August, 1952, the value of the corpus of the trust was \$66,000 and the average annual income was \$2,000.

By the terms of the will and the decree of the probate court the trustees were directed " * * * to use the income from the Trust for the care, maintenance, care and education of Karen Dee Kessler, and the said Trustees in their sole discretion may use as much of the principal for the purpose of caring for said Karen Dee Kessler as the said Trustees shall deem proper and advisable." The trust is to terminate when Karen reaches thirty years of age, and the trust estate is to be turned over to her. If she dies before then, distribution is to be to her issue. In the event she should leave no issue the trust funds go to her father, the respondent.

Since the establishment of the trust in January, 1948, only a little over one thousand dollars has been paid for the use and benefit of the child. This was between July, 1948, and July, 1949, when she was in the care of a Mrs. Rosebrock and the trustees were permitted to see her. Payments ceased, however, when the father took Karen to Cleveland, Ohio. Thereafter the trustees saw the beneficiary only once, when they journeyed to Cleveland for that purpose. At the time of the hearing she had been returned to California but the trustees had not been so informed. She resides with the respondent, her father; his mother, and the latter's husband, in a six-room single family residence.

In July, 1952, the trustees filed their petition alleging, among other things, that Mr.

Boller, Suttner & Boller, Arcadia, for appellants.

Kessler was interfering with their carrying out the trust by his refusal: (1) to divulge the whereabouts of the child; (2) to permit the trustees to see or visit the child to ascertain her welfare; and (3) to permit any funds to be expended for her support and benefit. The trustees sought instructions and requested the court to exercise its powers toward the fulfillment of the trust by ordering Mr. Kessler, among other things, to disclose the address of the child and to permit reasonable visitation by them "as trustees, within the scope of their duties." In his response Mr. Kessler revealed that Karen was living in his home and that it was agreeable to him that the trustees make payments from the trust for Karen's benefit "if such payments are made on a mutually satisfactory basis," but he would not consent to their seeing her.

After a trial the court found: that "the beneficiary would not be harmed by receiving visits from petitioners; that there would be nothing detrimental to the beneficiary in any association of the beneficiary with petitioners"; that the father "objects to any visit or association by the petitioners and said beneficiary" and "still refuses to permit petitioners to see, visit or talk with the beneficiary"; that "payments out of said trust fund for the benefit of beneficiary, both as income or principal, are to be made only in the sole discretion of petitioners"; that "visiting, seeing and talking with the beneficiary is necessary in order to permit petitioners properly to administer their trust and properly to exercise their discretion." The court then instructed the trustees "not to make any payments from income or principal of trust for benefit of beneficiary unless in their sole discretion such payments are necessary" and not to visit the child as long as the father objects. The court concluded that it "is without authority to grant the petitioners the right to visit such beneficiary over the objection of the father." The trustees appeal from this decision. In our opinion it is not sound.

[1] It must be borne in mind at the outset that this is not a custody or visitation case and not one involving an abuse of discretion by the trial court. The fact that the trustees are the grandparents of the

beneficiary should not militate against the right to exercise their duties under the trust. See *Benner v. Benner*, 113 Cal.App. 2d 531, 248 P.2d 425; *Smith v. Smith*, 85 Cal.App.2d 428, 433-434, 193 P.2d 56.

In dealing with matters involving children the primary concern of the court is their welfare. It is always solicitous to prevent any association or situation which would prove harmful. The trial court has answered this phase of our problem by its finding that the child will not be harmed by visits from petitioners and that there would be nothing detrimental to her in any association with them. On the other hand, petitioners have a duty to perform which they cannot properly perform without visiting, seeing and talking with the child. Additionally, the proper performance of that duty will undoubtedly be beneficial to the child, for it may well result in her having training and development opportunities which she would not otherwise have. In present day society, such things cost money—particularly in the case of training along special lines or for a college education. These and many other things that might be mentioned are important in the future happiness and success of this child, and in her achieving recognition and standing with her friends and in the community. The money is available—made so by the planning of a departed mother. No persuasive reason appears why it should not be used for the benefit of this child. The objection of the father to the trustees' seeing the child loses its potency and appears to be arbitrary in view of the court's findings. See *Smith v. Smith*, supra, 85 Cal. App.2d at page 434, 193 P.2d at page 59.

[2] The suggestion is made that the court's order will result in substantial accumulations in the trust and accord Karen "greater and perhaps more timely benefits" when the corpus is delivered to her at thirty years of age. What Karen needs during these formative years is not the prospect of an enlarged estate when she is thirty but increased opportunity for education, training and development which will prepare her to achieve a successful life as well as to earn a living and to take her place as a responsible and capable member of society. The

judicious investment of some or perhaps all the income from this trust, and even, possibly, some of its corpus, might reasonably be calculated to be of a greater benefit to her both in the immediate future and in the long run than the added accumulations some twenty years hence, which she might not live to enjoy. Of course if Karen should die before reaching thirty without leaving issue, respondent would come into the personal enjoyment of the trust estate.

[3] Counsel have cited *Odell v. Lutz*, 78 Cal.App.2d 104, 177 P.2d 628. Admittedly, however, it is not determinative of this case. There, grandparents sought an order granting them the right of visitation, which was denied. They also contended that as trustees they had an equivalent right. This the court denied because there were no payments of principal or interest to be made to the beneficiary until the child attained the age of twenty-five years. The court properly pointed out there that while the appellants had the management and control of the trust estate, the right to visit the beneficiary was not necessary for the administration of such an estate. Here we have a trust, which has always enjoyed the solicitude of equity. Courts of equity have administered trusts in myriads of situations. This trust is for a laudable purpose; the trustees are anxious to carry out that purpose but are virtually helpless unless they can see and talk with the beneficiary and thus have some basis for determining what expenditures would, in their opinion, be for her benefit; the beneficiary would undoubtedly profit from the judicious exercise of their authority; no detrimental or harmful effect would flow from their seeing and talking with the child, and the father's parental custody would not be disturbed. Under such circumstances a court of equity can and should take jurisdiction and assist in the carrying out of the trust.

[4] Finally, respondent says that " * * * even though it may be necessary for the administration of the trust for the trustees to visit the beneficiary it does

not follow that this must be done by the trustees personally. Under the express provision of the decree establishing the trust, they may exercise the right of visitation through an agent of their selection to whom the respondent would not object." This seems to concede the necessity of the trustees having unbiased information relative to the beneficiary and as to what would be for her benefit. However, since payments out of the trust "are to be made only in the sole discretion of petitioners" they are not required to rely on hearsay information and the opinions of others.

[5] In support of his argument that under the express provision of the decree establishing the trust, the trustees may exercise the right of visitation through an agent, the respondent points to the following paragraph: "In the event that the Trustees herein fail to qualify as Trustees or for any reason whatsoever are unable to act, they are hereby empowered to appoint someone in their place and stead to carry out the term of this trust." The purpose of this provision is not to authorize the trustees to delegate the exercise of their discretion to agents but rather to provide a method (in addition to that provided by section 1126, Probate Code) for appointing trustees in the event those named either failed to qualify or for any reason become unable to serve.

There is stricken from the Order Instructing Testamentary Trustees (signed and filed Nov. 20, 1952) paragraph III thereof, ordering the trustees "Not to visit or care for said beneficiary as long as Father of beneficiary objects" and also paragraph IV, which reads: "The court is without authority to grant the petitioners the right to visit such beneficiary over the objection of the father."

The order is reversed with directions to the trial court to fix the times, places, and circumstances under which the trustees may see, visit and talk with the beneficiary, Karen Dee Kessler.

MOORE, P. J., and McCOMB, J., concur.

120 Cal.App.2d 321

**ARVIZU v. IMPERIAL PHONOGRAPH
SERVICE, Inc.**
Civ. 4576.

District Court of Appeal, Fourth District,
California.

Sept. 21, 1953.

Action to recover sum of money paid in fraudulent sale of shares of stock. The Superior Court, Imperial County, Elmer W. Heald, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Griffin, Acting P. J., held that where defendant's affidavit filed in connection with his motion for new trial which was not passed upon by trial court within statutory period, if it could be properly considered by District Court of Appeal on review, presented only conflict of evidence, without sufficient showing as to why such evidence was not presented at trial, District Court of Appeal would not set aside plaintiff's judgment supported by evidence.

Affirmed.

1. New Trial ⇨155

Where defendant's motion for new trial was not passed upon by trial court within time limit provided by statute, motion was, in effect, denied without further order of trial court. Code Civ.Proc. § 660.

2. Appeal and Error ⇨837(8)

Where motion for new trial was argued and denied without reason being assigned, after time trial court had authority to pass on such motions, District Court of Appeal was compelled to limit its review of evidence to issues properly presented by appeal from judgment. Code Civ.Proc. § 660.

3. Licenses ⇨39.24

Limitation of Actions ⇨197(2)

In action to recover sum of money paid to and received by defendant corporation in fraudulent sale of shares of stock, evidence sustained general findings for plaintiff, and specific finding for plaintiff that statute of limitations did not commence to run on plaintiff's cause until date plaintiff discovered fraudulent nature of transaction. Corporations Code, §§ 25000 et seq., 25009, 25152, 25153, 25601, 25700.

4. New Trial ⇨147

In action to recover for fraudulent sale of corporate shares of stock, even if defendant's affidavit filed in connection with motion for new trial on ground of surprise resulting from plaintiff's false testimony which was not timely passed upon by trial court, could be properly considered, affidavit presented only conflict of evidence, without showing why such evidence was not presented at trial, and was insufficient. Code Civ.Proc. § 660; Corporations Code, §§ 25000 et seq., 25009, 25152, 25153, 25601, 25700.

James E. Marable, El Centro, for appellant.

Irvin C. Evans, Los Angeles, for respondent.

GRIFFIN, Acting Presiding Justice.

This is an action based on a common count of money had and received, to recover \$700 predicated on a claimed fraudulent sale of seven shares of stock in defendant corporation in September, 1946, to plaintiff. In a trial by the court plaintiff recovered judgment in said amount and defendant appealed.

As stated in the opening brief, the only question raised on appeal is the claim that plaintiff unexpectedly testified falsely at the trial as to certain material facts and took defendant by surprise, misled the court, and prevented defendant from having a fair trial, and that upon such showing it was entitled to a new trial as a matter of right, citing such cases as Rudin v. Luman, 53 Cal.App. 212, 199 P. 874; and Guy v. Hanly, 21 Cal. 397. In its brief, however, the merits of the conflicting evidence in the case is made the subject of attack.

[1] After entering judgment on February 26, 1952, plaintiff served, on April 25, 1952, notice of entry of judgment. Defendant, on April 30, 1952, gave plaintiff notice of intention to move for a new trial upon the ground indicated and filed affidavits in support thereof. Plaintiff presented a counter-showing. Hearing on the motion was set for June 13, 1952, and counsel for plaintiff was so notified. On June

9, 1952, plaintiff's attorney phoned defendant's attorney and asked for a continuance of two weeks because of his inability to be present and argue the matter on the date set. Counsel for defendant consented to such continuance without thinking that the extension would be beyond 60 days from the date of service of the notice of entry of judgment. Under Section 660 of the Code of Civil Procedure the power of the court to pass on that motion expired on June 25th, and the effect was a denial of the motion without further order. *Holquin v. Allison*, 97 Cal.App. 126, 274 P. 1037.

[2] On June 27, 1952, two days thereafter, the motion came on for hearing. Counsel for plaintiff called the court's attention to the possibility of lack of jurisdiction to act, but announced he was prepared to oppose the motion. The motion was fully argued, submitted for decision and, on the same day, the court entered a formal order denying the motion without stating any reason therefor. Under these circumstances we will be compelled to limit our review of the evidence to any issues properly presented by an appeal from the judgment.

The testimony of plaintiff shows that in Imperial County, in September, 1946, he agreed to purchase shares of stock in defendant company, a Nevada corporation, prior to the actual date of its incorporation; that he was not one of its original incorporators; that on October 14, 1946, he was issued a certificate of stock for 2,500 shares; that certain other stock was sold; that all of it was sold in violation of the Corporate Securities Act of this state, and particularly sections 25009, 25152, 25153, 25601 and 25700 of the Corporations Code, and that plaintiff had no knowledge of defendant's violation of these sections until about February 21, 1951; that he never had any notice of any stockholders' meetings; that when he addressed a registered letter to the company requesting information about it and its progress he received no reply; that he then instituted an investigation and found that it had no permit in California to sell such stock

and had violated the sections above mentioned. Evidence of such violations was corroborated by certificates from the several public officials of this State authorized to issue such certificates.

The president of defendant corporation, Mr. Loo, testified that plaintiff did make investigation as to the feasibility of the venture; that he and plaintiff went to see an attorney about organizing a corporation; that the attorney advised the formation of a Nevada Limited corporation; that it would be organized there by certain individuals who were residents of that State who would be named as officers; that they would sell the stock to the California resident subscribers in Nevada; that the original officers would resign and they would be replaced by local stockholders; that certificates were accordingly issued but for some reason plaintiff's certificate remained in the certificate book for some time and was subsequently mailed to plaintiff.

Plaintiff testified that he took no part in the organization of the corporation; that Loo and another person asked him if he would like to invest in the company's business that they were then operating in Imperial County; that he left for Los Angeles and came back with \$700 and gave it to Mr. Loo; that he received no receipt for it; that Loo told him the company needed the money and hoped he could obtain some more; that he never went to Nevada and never received a stock certificate until 1947; that he never in his life met the lawyer mentioned by Mr. Loo, never was in his office, and never talked to anyone except Mr. Loo and a Mr. Valencia about the defendant corporation.

[3] Upon this evidence the court found generally in favor of plaintiff and that in 1946, Loo solicited plaintiff for the purchase of stock in defendant corporation in the State of California; that he lacked a permit to sell the stock and had violated certain sections of the Corporations Code above enumerated; that no transaction relating to the sale of said shares was conducted in Nevada; that neither Loo nor

plaintiff was ever there in connection with the formation of the corporation; that the power of attorney, admittedly signed by plaintiff in connection therewith, was never delivered to said corporation nor acted upon by it in Nevada; and that plaintiff did not discover that defendant corporation or Loo was without the required permit in California until some time in February, 1951.

The court then specifically found that any statute of limitations pleaded by defendant against plaintiff did not commence to run until the date of such discovery. Under the evidence thus presented, the court was justified in finding for plaintiff. *Boss v. Silent Drama Syndicate*, 82 Cal. App. 109, 255 P. 225; *Goodspeed v. Great Western Power Company*, 33 Cal.App.2d 245, 91 P.2d 623, 92 P.2d 410.

[4] Defendant's affidavit presented on the motion for new trial contradicted plaintiff's testimony as to the activities of plaintiff, Loo and a Mr. Valencia in reference to entering into the business, and related to statements which indicated that there was a mutual intention of plaintiff and Loo to form a corporation. In Valencia's affidavit he stated that only he and Loo went to the attorney's office in reference to the formation of the corporation, but that they subsequently informed plaintiff about their plans; that accordingly plaintiff signed a power of attorney to one Brady in Nevada, which was prepared by the corporation's attorney and which was to be used in the formation of the corporation, and that it was subsequently mailed to Brady in Nevada.

In a counteraffidavit plaintiff averred that certain statements in defendant's affidavit were false, libelous, and untrue, and pointed out that Valencia's affidavit corroborated his testimony to the effect that he never did visit the attorney's office with Loo in California.

We conclude that the evidence produced by plaintiff does support the findings and judgment, and if the affidavit could be properly considered on the motion for new trial, only a conflict in the evidence was presented and there is no sufficient showing

made why said evidence could not have been produced at the trial. (20 Cal.Jur. p. 80, sec. 57, and cases cited.)

Judgment affirmed.

MUSSELL, J., concurs.



120 Cal.App.2d 353

ARNOLD et ux. v. CITY OF SAN DIEGO.

Civ. 4585.

District Court of Appeal, Fourth District,
California.

Sept. 24, 1953.

Rehearing Denied Oct. 16, 1953.

Hearing Denied Nov. 19, 1953.

Action against a city to quiet title to specified realty, wherein defendant filed a cross-complaint. The Superior Court of San Diego County rendered a judgment adverse to the defendant and the defendant appealed. The District Court of Appeal, Mussell, J., held that where subdividers of land in city paved a certain area and obliterated boundaries of existing alley and put in curbing indicating area to be used by public for street purposes, and public used such area as street for many years, such area was dedicated to public use and accepted by public, and purchaser of part of such subdivision who inspected land when he purchased it, saw paved area involved, bounded by curb, and knew public was using it for street purposes, was not protected against unrecorded dedication, notwithstanding such purchaser would not have purchased such land if city attorney had not told him city did not want such land, and if he had known of city's claim of easement.

Judgment reversed.

I. Easements ⇨37

Question of whether use of an easement is adverse and under a claim of right, or permissive and with owner's consent, and whether nature of user is sufficient to put owner on notice, are ordinarily questions of fact, and all conflicts must be resolved in favor of prevailing party and evidence viewed in light most favorable to him.

2. Dedication Ⓒ15, 16(1)

An intent to dedicate land may be shown by a writing or by acts of ownership of such land, and dedication may be either express or implied.

3. Dedication Ⓒ20(3)

Where public, or such portion of it as has occasion so to do, travels a road, with full knowledge of landowners interested without asking or receiving permission and without objection, for a period of time beyond that required to bar a right of action, a right in public to use of road arises by implied dedication.

4. Dedication Ⓒ20(2)**Vendor and Purchaser** Ⓒ229(8)

Where subdividers of land in city paved a certain area and obliterated boundaries of existing alley and put in curbing indicating area to be used by public for street purposes, and public used such area as street for many years, such area was dedicated to public use and accepted by public, and purchaser of part of such subdivision who inspected land when he purchased it, saw paved area involved, bounded by curb, and knew public was using it for street purposes, was not protected against unrecorded dedication, notwithstanding such purchaser would not have purchased such land if city attorney had not told him city did not want such land and if he had known of city's claim of easement.

5. Dedication Ⓒ33**Municipal Corporations** Ⓒ78

City of San Diego is a charter city and is not subject to general laws in matters concerning municipal affairs except as charter provides, and State Planning Act did not prohibit San Diego from acquiring land by dedication without approval of planning commission and acceptance by city's legislative body. Gen.Laws, Act 5211b, § 1 et seq.

Herney & Herney, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs brought this action against the city of San Diego to quiet title to lots 1 to 5, inclusive, in block 2, College Park Unit No. 1 in said city. The city filed an answer alleging that it is the owner of an easement for street and highway purposes over and across the westerly portion (approximately 50 feet) of each of said lots and also filed a cross-complaint in which it is alleged that the said westerly portion of said lots is subject to easements as a public street and highway in favor of the public and abutting property owners, and was dedicated and accepted as a public street and highway for more than five years prior to the filing of said complaint, and has been in open, continuous and notorious use by the public and abutting property owners as a public street and highway ever since said dedication.

The trial court found that the said westerly portion of said lots involved had not been dedicated either to the defendant or the general public as a public street or highway; that the use of said property by the public for street and parking purposes was not exclusive, hostile, adverse or under any claim of right and that "neither the defendant, nor the general public, was at any time in the actual, or the open, or the notorious, or the uninterrupted, or the exclusive, or the hostile possession of said real property or any part or any portion thereof."

Defendant appeals from the judgment which was entered in favor of plaintiffs quieting their title to all the property described in the complaint.

A subdivision of College Park Unit No. 1 was filed of record in the office of the county recorder August 18, 1931, as map number 1296. This map shows that lots 1 to 5, inclusive, run east and west; that they are bounded on the east by College Avenue and on the west, a 20 foot alley extends northerly and southerly along the westerly end of said lots. The subdividers were the Mission Palisades Corporation

J. F. DuPaul, City Atty., San Diego,
Alan M. Firestone and Mona Andreen,
Deputy City Attys., San Diego, for appel-
lant.

and Bell-Lloyd Corporation. Subsequent to the time of filing the subdivision the subdividers revised the subdivision map and in a letter to the city planning commission, dated March 30, 1932, offered to dedicate all of lots 1 to 5, inclusive, Block 2, in said subdivision, to the city of San Diego as a Plaza. The subdividers then, through their officers, appeared before the planning commission on April 7, 1932, to obtain an approval of the revised subdivision map. The minutes of the planning commission show that the commission voted to reject a portion of certain alleys and adopt certain streets shown on the revised map. However, the minutes do not show that the plan for the Plaza was accepted and the revised map was never filed for record. In 1932 the subdividers caused the approximate westerly 50 feet of said lots, together with the said alley and a small triangular point of land to the southwesterly end of the area to be graded, paved and curbed. The paved area connected with Mission Valley Road, now called Montezuma Road, on the south, and Commerce Avenue, now called Bonito Paseo, on the north, and was approximately 70 feet in width. The subdividers painted the word "Plaza" on the curbs of the paved area.

From the time of the paving of this area by the subdividers until 1950 the street was used by the public as a public street without protest or objection of the subdividers or any subsequent owners. The plaintiffs acquired title to lots 1 to 5, block 2, in 1944, and at the time of acquiring the property Mr. Arnold personally inspected the area and had knowledge of the existence of the paving and curbing and the use of the area by the public. The record does not contain any evidence indicating that plaintiffs objected to the use of the paved area as a street until 1950 when Mr. Arnold erected posts across the southerly end of the paved area, which posts were removed by the city the day following their erection. Since the removal of the posts, the whole of the said paved area has been in use by the public without interruption or objection from any one.

The principal question here involved is whether the said paved portion of lots 1 to

5, inclusive, is subject to an easement as a public street and highway.

[1-3] The question of whether the use of an easement is adverse and under a claim of right, or permissive and with the owner's consent, and whether the nature of the user is sufficient to put the owner on notice, are ordinarily questions of fact, and all conflicts must be resolved in favor of the prevailing party and the evidence viewed in the light most favorable to him. *O'Banion v. Borba*, 32 Cal.2d 145, 147, 148, 195 P.2d 10. However, in *Hare v. Craig*, 206 Cal. 753, 757, 276 P. 336, 338, it is held that:

"When the public or such portion of the public as had occasion to use a road has traveled over it for a period of more than five years with full knowledge of the owner, without asking or receiving permission to do so and without objection being made by any one, a conclusive presumption of dedication to the public arises. *Hartley v. Vermillion*, 141 Cal. 339, 74 P. 987; *Lantz v. City of Los Angeles*, 185 Cal. 262, 196 P. 481; *Leverone v. Weakley*, 155 Cal. 395, 101 P. 304; *Southern Pac. Co. v. Pomona*, 144 Cal. 339, 77 P. 929; *Schwerdtle v. County of Placer*, 108 Cal. 589, 41 P. 448."

As was said in *Sanger v. Southworth*, 87 Cal.App.2d 16, 18, 195 P.2d 482, 483:

"An intent to dedicate may be shown by a writing or by acts of the owners. The dedication may be either express or implied. 9 Cal.Juris. 19. It is implied when the acts of the owner indicate a clear intention to dedicate. *People v. Myring*, 144 Cal. 351, 77 P. 975. As said in 9 Cal.Juris. page 41:

"Where the public, or such portion of it as has occasion so to do, travel a road, with full knowledge of the land owners interested, without asking or receiving permission and without objection, for a period of time beyond that required to bar a right of action, a right in the public to the use of the road arises by implied dedication."

To the same effect is *Diamond Match Co. v. Savercool*, 218 Cal. 665, 669, 24 P.2d

783, and in *City of Laguna Beach v. Consolidated Mtg. Co.*, 68 Cal.App.2d 38, 42, 43, 155 P.2d 844, 847, the general rules are thus stated:

"To constitute a valid and complete dedication, there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the lands to public use (*City of Venice v. Short Line Beach Land Co.*, 180 Cal. 447, 450, 181 P. 658), and an acceptance either by public use or formal resolution. (*Brown v. Bachelder*, 214 Cal. 753, 7 P.2d 1027.) The intention to which courts give heed is an intention manifested by the owner's acts and finding expression in his conduct. *City of Los Angeles v. McCollum*, 156 Cal. 148, 103 P. 914, 23 L.R.A.,N.S., 378. It may be either express or implied, and is implied when the acts and conduct of the owner indicate clearly an intention to devote the land to the public use. *People v. Myring*, 144 Cal. 351, 354, 77 P. 975, 976. The law will imply an intention to dedicate from long acquiescence in the use of land for highway purposes, for it is settled that the common-law rule as to the presumption of dedication by adverse user is applicable in this state. *Schwerdtle v. County of Placer*, 108 Cal. 589, 592, 41 P. 448. * * *

"Of course, where the dedication of a highway is sought to be established by user, it must be shown that the user was adverse, continuous, and with the knowledge of the owner, for the required period of time. *City of San Diego v. Hall*, 180 Cal. 165, 168, 179 P. 889. So far as the element of time is concerned, periods varying from five to forty years have been held sufficient. *Plummer v. Sheldon*, 94 Cal. 533, 29 P. 947; *Barnes v. Daveck*, 7 Cal.App. 487, 94 P. 779. The adverse character of the use and the knowledge and acquiescence of the owner may be inferred from circumstances, and long-continued adverse user establishes against the owner the conclusive presumption of knowledge and acquiescence.'"

[4] In the instant case, the subdividers, by their acts in paving the area in question, obliterated the boundaries of the existing alley and put in curbing indicating the area to be used by the public for street purposes. The use of this area as a street by the public without objection for many years is undisputed. Plaintiffs, having purchased the property in 1944 with full knowledge of such use, did nothing to interfere at any time until 1950, interrupting it then for one day only. Under the rules stated, the paved area involved was clearly dedicated to public use and accepted by the public. The stated findings of the trial court to the contrary are not supported by substantial evidence and under the circumstances shown are not conclusive on appeal.

Plaintiffs contend that they were bona fide purchasers and their rights are protected as against any unrecorded dedication. This contention is without merit, for, as noted, plaintiff Arnold inspected the property at the time he purchased it, saw the paved area involved, bounded by curbs, and knew that the public was using it for street purposes. He was thus upon inquiry as to the character of such use. Plaintiff Arnold testified that after he inspected the property, he was informed by the city attorney that they did not want the property and that he, Arnold, would not have bought the lots had he known of the city's claim of an easement; that he was not aware that the city claimed any rights in the property until six years after he had purchased it. There was also evidence that the said paved area was not listed or dedicated as a street in the record books of the city. Apparently that was not done for the reason that there had been no map filed showing a formal dedication. These circumstances are not sufficient to nullify the implied dedication and acceptance by the public of the disputed area as a street.

[5] Plaintiffs also argue that the California Planning Act of 1929, Stats.1929, Ch. 838, p. 1805, Deering's Gen.Laws, Act 5211b, prohibits the city planning commission from acquiring property by "dedication" except where such rights are first approved by the planning commission and accepted by the city's legislative body.

However, the city of San Diego is a chartered city and is not subject to general laws in matters concerning municipal affairs except as the charter itself may provide, *Heilbron v. Sumner*, 186 Cal. 648, 650, 200 P. 409, and it does not appear that the said planning act was incorporated therein.

Judgment reversed.

GRIFFIN, Acting P. J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



120 Cal.App.2d 456

POSELLA v. POSELLA.

Civ. 19565.

District Court of Appeal, Second District,
Division 1, California.

Sept. 29, 1953.

Rehearing Denied Oct. 19, 1953.

Hearing Denied Nov. 24, 1953.

Action by husband for divorce. Wife counterclaimed for separate maintenance. The Superior Court, Los Angeles, Irvin Taplin, J., entered interlocutory judgment for divorce and wife appealed. The District Court of Appeal, Drapeau, J., held that there was substantial evidence in support of findings upon which interlocutory decree and orders were based.

Judgment affirmed.

Divorce ⇌ 184(10)

In divorce action, where husband presented substantial evidence in support of findings upon which interlocutory decree of divorce was based, and no error or abuse of discretion of trial court appeared, District Court of Appeal had no power to set aside divorce decree.

Julia Blance Posella, in pro. per.

Zagon, Aaron & Sandler, Los Angeles,
for respondent.

DRAPEAU, Justice.

Plaintiff husband brought this action for divorce. His wife countered with a cross-

complaint for separate maintenance. After a three-day trial, the judge of the Superior Court found for the husband and against the wife, divided their community property equally between them, awarded custody of their three minor children to the wife, ordered the husband to support the children and directed him to make them beneficiaries of his life insurance policies.

The wife appeals from the interlocutory decree.

She was advised by her counsel that on the record she had no good grounds of appeal. Nevertheless she has prepared and filed her briefs in this Court *in propria persona*.

The record has been carefully examined. No error or abuse of discretion of the trial court appears. The husband presented substantial evidence in support of the findings upon which the interlocutory decree and orders were based.

It is elementary law in this state that in such circumstances an appellate court has no power to set aside the decree. *DeYoung v. DeYoung*, 27 Cal.2d 521, 165 P.2d 457; *Norris v. Norris*, 50 Cal.App.2d 726, 123 P.2d 847; *Scheibe v. Scheibe*, 57 Cal.App.2d 336, 134 P.2d 835; *Krull v. Krull*, 105 Cal.App.2d 56, 233 P.2d 13.

A review of this case leaves one with a feeling of sympathy for the helplessness of this woman, trying to plead her own case. She doesn't want a divorce; she has done the best she could. But, like a ship drifting in a strange sea, without chart or pilot, she never had a chance on appeal.

When her case was determined against her on conflicting evidence in the Superior Court, it was lost. For the benefit of appellant, the basic rule is quoted from 4 Cal. Jur.2d p. 487:

"Before an appellate court is justified in reversing a judgment on the ground of insufficiency of evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party that may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes that pre-

vailing party from recovering a judgment. The evidence must be considered by the appellate court, but not weighed as against the conflicting evidence, and it is immaterial that the appellate court would have determined that the weight of the evidence favored the appellant. All of the evidence most favorable to the respondent must be accepted, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence accepted is sufficient as a matter of law, *the judgment must be affirmed*. Thus, the character of the evidence presented by the appellant is of no significance, since only the character of the evidence offered by the respondent is material. That is the evidence which must be scrutinized to determine whether it offers the necessary support of the findings or verdict." (Emphasis added.)

The judgment is affirmed.

DORAN, Acting P. J., and ROBERT H. SCOTT, J. pro tem., concur.



120 Cal.App.2d 313

PEOPLE v. ZOLLO.

Cr. 5001.

District Court of Appeal, Second District,
Division 2, California.

Sept. 21, 1953.

Hearing Denied Oct. 22, 1953.

Defendant pleaded not guilty of assault with intent to commit robbery by reason of insanity and was committed to a state hospital as a mentally ill person on his application after being found sane at the time of commission of the offense. From a judgment of the Superior Court of Los Angeles County, Philip H. Richards, J., sentencing defendant to the state prison, and from orders of such court denying defendant's motions to stay the proceedings and reinstate his original plea of not guilty, he appealed. The District Court of Appeal, Fox, J., held that

the Superior Court had jurisdiction to pronounce judgment and sentence as against the contention that defendant had not been discharged from the hospital, in view of evidence of his discharge therefrom before pronouncement of the judgment and sentence and absence of evidence rebutting presumptions that defendant was properly discharged and that the trial judge acted in lawful exercise of his jurisdiction.

Judgment and orders affirmed.

1. Criminal Law ⇨981(1)

The Superior Court had jurisdiction to pronounce judgment against and sentence to state prison one pleading not guilty of assault with intent to rob by reason of insanity as against contention that he had not been discharged from state hospital, to which he was committed as mentally ill person after being found sane at time of commission of offense in view of evidence of his discharge from hospital before pronouncement of judgment and sentence and absence of evidence rebutting presumptions that he was properly discharged and that trial judge acted in lawful exercise of his jurisdiction. Code Civ.Proc. § 1963, subds. 15, 16; Pen.Code, § 1016; Welfare and Institutions Code, §§ 5100, 6730.

2. Criminal Law ⇨981(1)

A certificate of accused's discharge from state hospital, to which he was committed as mentally ill person after being found sane at time of his admitted commission of assault with intent to commit robbery, of which he pleaded not guilty by reason of insanity, was not required to be filed with court, nor any particular formality followed in notifying court of such discharge, in order to authorize pronouncement of judgment against accused and his sentence to state prison. Pen.Code, § 1016; Welfare and Institutions Code, §§ 5100, 6730.

3. Criminal Law ⇨322

Official duty is presumed to have been regularly performed. Code Civ.Proc. § 1963, subd. 15.

4. Insane Persons ⇨51

A patient's discharge from state hospital before pronouncement of judgment

sentencing him to state prison for offense, which he admitted by changing his plea of not guilty to plea of not guilty by reason of insanity, is presumed to have been proper. Code Civ.Proc. § 1963, subd. 15; Pen.Code, § 1016; Welfare and Institutions Code, § 6730.

5. Criminal Law ⚖️322

A court or judge, acting as such, is presumed to have acted in lawful exercise of jurisdiction. Code Civ.Proc. § 1963, subd. 16.

6. Insane Persons ⚖️51

Escape from state hospital of one committed thereto as mentally ill person did not preclude hospital superintendent from discharging him. Welfare and Institutions Code, §§ 5100, 6730.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was accused of an assault with intent to commit robbery. It was also charged that he had been convicted of highway robbery, a felony, in Virginia, and had served a term in the state prison therefor. Initially defendant entered a plea of not guilty and denied the prior conviction. Thereafter, with the court's permission, he changed his plea of "not guilty" to one of "not guilty by reason of insanity," and admitted the prior conviction. After a trial on the issue of insanity, defendant was found to be sane at the time of the commission of the offense. The medical reports also disclosed that he was sane at the time of trial. Having admitted the commission of the offense charged by his change of plea, Penal Code, sec. 1016, defendant was granted permission to file an application for probation. Before passing on his application for probation, the court, at defendant's request, permitted him to file, in the psychopathic department of the court, an application to be declared a mentally ill person.

He was thereafter so adjudged and committed to Camarillo State Hospital under the provisions of section 5100 of the Welfare and Institutions Code. The matter of probation and sentence was then placed off calendar in the Criminal Department. Some three months later defendant escaped from Camarillo. A bench warrant was thereupon issued by the Criminal Court. Defendant was ultimately apprehended in New York and returned to this jurisdiction. On January 7, 1953, defendant was brought before the Criminal Court (the same judge presiding) for judgment and sentence. Defendant made a motion to stay proceedings and also a motion to reinstate his plea of not guilty. These motions were denied, probation was denied, and defendant was sentenced to the state prison. He appealed from the judgment and the orders denying his motions.

[1-5] Defendant challenges the jurisdiction of the court to pronounce judgment and sentence on the ground that he had not been discharged from Camarillo State Hospital and was therefore still under the jurisdiction of the Department of Mental Hygiene of the State. His position, however, is not well founded.

Section 6730 of the Welfare and Institutions Code provides that "The superintendent of a State hospital, on filing his written certificate with the Director of Institutions, may discharge as improved, or may discharge as unimproved, as the case may be, any patient who is not recovered, but whose discharge, in the judgment of the superintendent, will not be detrimental to the public welfare, or injurious to the patient." Under the authority of this section defendant was discharged from Camarillo as unimproved on Jan. 5, 1953,—two days prior to pronouncement of judgment and sentence. The court was so advised in a letter signed by the Administrative Assistant to the Superintendent of the Hospital. In this connection it should be pointed out that there is no requirement that a certificate of discharge be filed with the court or that any particular formality be followed in notifying the court. (See *People v. Puter*,

85 Cal.App.2d 348, 193 P.2d 23; *People v. Lindley*, 26 Cal.2d 780, 788, 161 P.2d 227. Furthermore, it is presumed that official duty has been regularly performed. Code Civ.Proc. sec. 1963, subd. 15; *People v. Lindley*, supra, 26 Cal.2d 789, 161 P.2d 232. Thus the presumption is that defendant was properly discharged under section 6730, Welfare and Institutions Code, prior to the pronouncement of judgment. There is also the further presumption "That a court or judge, acting as such, * * * was acting in the lawful exercise of his jurisdiction." Sec. 1963, Code Civ.Proc. subd. 16;

People v. Superior Court, 4 Cal.2d 136, 147, 47 P.2d 724. There is nothing in the record to rebut these presumptions.

[6] The fact that defendant was an escapee from the state hospital at the time of his discharge did not preclude the superintendent from discharging him. *Shaw v. Feehan*, 207 Cal. 561, 567-568, 279 P. 658; *People v. Geiger*, 116 Cal. 440, 441, 48 P. 389.

The judgment and orders are affirmed.

MOORE, P. J., and McCOMB, J., concur.

41 Cal.2d 525

PEOPLE v. VAN WINKLE.**Cr. 5434.**

Supreme Court of California, in Bank.

Sept. 25, 1953.

Prosecution for first degree murder and assault with intent to commit murder. The Superior Court, San Francisco County, H. A. van der Zee, J., entered judgment of conviction, and defendant appealed. The Supreme Court, Shenk, J., held, inter alia, that statement by jury foreman, when judge set date for trial by same jury on plea of not guilty by reason of insanity, that he thought it was imposition to ask the jury to sit on the trial further, did not indicate that jurors had pre-judged question of defendant's sanity, and judge did not abuse discretion in requiring the jury to sit through the entire proceedings and to determine the question of defendant's sanity at the time of the crimes.

Affirmed.

I. Criminal Law ☞625**Jury ☞149**

Statement by jury foreman, when court set date for trial before same jury on plea of not guilty by reason of insanity, that he thought it was imposition to ask the jury to sit on the trial further, did not indicate that jurors had prejudged question of defendant's sanity, and court did not abuse discretion in requiring jury to sit through entire proceedings and to determine question of defendant's sanity at time of charged crimes. Pen.Code, §§ 189, 1026.

2. Homicide ☞237

Evidence sustained verdict that defendant was sane at time first degree murder and assault with intent to commit murder were committed. Pen.Code, §§ 189, 1026.

Gerald J. Kenny, Public Defender, and Joseph I. McNamara, Deputy Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and Arlo E. Smith, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an appeal from a judgment of convictions and from orders denying mo-

tions for a new trial. Under Count I of the indictment the defendant was found guilty of the murder of Police Officer Robert Walters and the extreme penalty was imposed. Under Count II he was found guilty of assault with intent to commit the murder of Special Officer Lawrence Jones, and was sentenced to imprisonment for the term prescribed by law. Penal Code, § 217. To each count the defendant interposed pleas of not guilty and not guilty by reason of insanity.

The sole contention of the defendant is that the trial court committed prejudicial error in requiring the same jury which had returned the verdicts of guilty to then determine the question of the defendant's sanity under the provisions of Section 1026 of the Penal Code.

The record shows that on September 19, 1952, at approximately 4:30 p.m. the defendant, carrying a paper bag, entered the offices of the Personal Finance Company in San Francisco and inquired about a loan. Upon being shown into the manager's office he withdrew a gun from the bag and ordered the manager to open the safe. He was informed that there was no safe in the manager's office. After threatening the manager he returned to the general work area and ordered all employees to put their hands on their desks and keep them there. A customer entered about that time and was ordered at gun point by the defendant to sit down after leaving a payment of money on the counter top. The defendant then handed the manager the paper bag and ordered him to fill it with currency from the cash drawers and a strong box. This the manager did. As the defendant left with the paper bag filled with currency he picked up the money left by the customer and ordered the employees not to sound an alarm. However the employees attracted the attention of police officers in the street several floors below and informed them of the robbery. The officers rushed to the door of the building as the defendant came out. Officer Walters attempted to arrest him. They moved to the sidewalk where wrestling took place. Special Officer Jones attempted to assist Walters by restraining the defendant who then fired three shots, two of them

entering Walters' abdominal region and the third striking the little finger of his left hand. Jones threw the defendant to the sidewalk and tried to seize the gun. Jones was shot once in the wrist, and a second bullet was spent as it penetrated a magazine carried in the inner pocket of his coat. The defendant then broke away and as he fled from the scene was shot down by Officer Walters from where the latter had collapsed on the sidewalk. The paper bag containing \$837 was found on the sidewalk after the shootings. Walters died as a result of his wounds on September 26, 1952.

At the trial the defendant was identified by the manager and the employees of the finance company as having committed the armed robbery in the offices of the company a few minutes before the shootings. These and other witnesses testified that the defendant walked steadily and calmly, spoke clearly and coherently and appeared to be fully conscious of what he was doing at all times during the robbery. There was evidence that following his apprehension the defendant admitted that he walked down the stairs from the offices of the finance company and took a wrong door into the basement; that he retraced his steps and went out through the main doorway; that he was accosted by the officers as he passed through the door; that he committed the robbery because his "funds were running low"; and that he shot the officers because he "wanted to get away." The defendant relied upon evidence of a long history of mental illness which he claims rendered him unconscious for certain periods of time and particularly during the time when the alleged offenses were committed. He took the stand in his own behalf and testified that he could remember nothing of what happened on September 19, 1952, from early morning until he found himself engaged in a life and death struggle with two unknown assailants. It would seem unnecessary to say that the evidence abundantly supports the convictions on the pleas of not guilty.

Section 1026 of the Penal Code provides in part that "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall

first he tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty * * * then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. * * *

Following the verdicts of guilty on the pleas of not guilty the court set a date eight days in advance for the trial before the same jury on the pleas of not guilty by reason of insanity. In open court the foreman of the jury then stated: "Your Honor, I think it is an imposition to ask this jury to sit on the trial further, and I wish to offer our objections as to sitting on the second phase of the trial. That may have no bearing on the case, but that is our feeling." Counsel for the defendant then pointed out that the court had the right to select a new jury if the present jurors did not want to sit on the sanity question. The court made the following statement: "That is a matter for the Court, Mr. Kenny [Counsel for the defendant]. I would prefer that this same jury decide the question of insanity, since you have heard the entire evidence in this case so far." At the beginning of the trial on the sanity issue counsel for the defendant objected on the ground that the jury should not be allowed to serve. The objection was overruled. The same objection was later unsuccessfully asserted as grounds for a new trial.

It is the contention of the defendant that the statement of the foreman gave notice to the court that members of the jury had pre-judged the question as to the defendant's sanity; that they were prejudiced at the outset of the trial on this issue, and that to order that jury to serve on the sanity issue deprived the defendant of a fair and impartial trial.

[1] There is no basis for the contention that the jurors had pre-judged the question of the defendant's sanity. The reason given by the foreman for requesting their discharge was that it was "an imposition to

ask the jury to sit on the trial further." The foreman also indicated that the jury's request had no bearing on the case itself but was made for personal reasons. There is no indication elsewhere in the record that the jury was biased against the defendant. In view of these circumstances the court acted within the discretion conferred upon it by Section 1026 in requiring the same jury to sit through the entire proceedings. No abuse of discretion has been shown.

[2] During the sanity trial the prosecution called the three alienists appointed by the court to determine the defendant's sanity in accordance with Section 1027 of the Penal Code. These doctors testified that in their opinions the defendant was sane at the time of the robbery and the following assault and homicide. The only other evidence offered on the question of sanity was the testimony of the defendant himself who reiterated statements he had made on the trial of his plea of not guilty to the effect that he was not conscious of what transpired during the robbery until he was seized by the police officers. This conflicted with the testimony of the doctors who testified further that the defendant was not only legally sane at the time of the crimes, but that he was also sane by medical standards and that he was fully conscious and in control of his actions. This expert opinion was in line with the testimony of numerous other witnesses that the defendant walked steadily and calmly, spoke clearly and coherently and appeared to be fully conscious of what he was doing. The jury's verdict that the defendant was sane at the time the offenses were committed is also fully supported by the evidence.

The question raised by the defendant on this appeal is not new. It has been held in other cases under similar circumstances that the court could require the same jury to serve throughout the trial. *People v. French*, 12 Cal.2d 720, 765, 87 P.2d 1014; *People v. Goodwin*, 9 Cal.2d 711, 72 P.2d 551; *People v. Goold*, 215 Cal. 763, 12 P.2d 958; *People v. Woods*, 19 Cal.App.2d 556, 65 P.2d 940; *People v. Willison*, 116 Cal. App. 157, 2 P.2d 543.

The defendant had a full and fair trial. The evidence in support of his convictions is beyond question. The offense charged in Count I and proved on the trial was first degree murder under Section 189 of the Penal Code. The allegations of Count II charging an assault with intent to commit murder were conclusively proved to be true.

The judgment and the orders denying the motions for a new trial are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



41 Cal.2d 509

In re DUKE'S ESTATE.

LOGAN v. SHELBY et al.

L. A. 22437.

Supreme Court of California, in Bank.

Sept. 25, 1953.

Petition by surviving husband of testatrix to revoke probate of will which had been executed prior to petitioner's marriage to testatrix and which excluded any person who might after date of the will become an heir of testatrix by reason of marriage. The Superior Court, San Diego County, Dean Sherry, J., entered judgment from which petitioner appealed. The Supreme Court, Edmonds, J., held, *inter alia*, that the will mentioned a future spouse in such a way as to show an intention not to provide for him, and, therefore, the will was not revoked as to petitioner.

Affirmed.

Carter and Schauer, JJ., dissented.

Prior opinion, Cal.App., 251 P.2d 21.

1. Wills ⇐191

At common law, revocation of will because of subsequent change in domestic relations of testator was based upon his implied intention, but in California, doctrine of implied revocation has been replaced by statutory presumption of revocation which operates upon showing that spouse married

testator after making of will and survived testator. Probate Code, § 70.

2. Wills ☞191

Will excluding any person who might after date of will become heir of testatrix by reason of marriage mentioned future spouse in such way as to show intention not to provide for him, and, therefore, will was not revoked as to surviving spouse by statutory presumption of revocation. Probate Code, § 70.

3. Wills ☞296, 384

Where will excluded any person who might after date of will become heir of testatrix by reason of marriage, there was no such uncertainty as to whether future spouse was excluded as to make admissible extrinsic evidence concerning testatrix' intention, but, in view of fact that such extrinsic evidence merely tended to support correct legal conclusion of trial court that after-acquired husband was excluded, no prejudice resulted to either party by admission of such evidence. Probate Code, § 70.

4. Appeal and Error ☞113(1)

Appeal would not lie from order denying motion to vacate judgment. Probate Code, § 1240.

David H. Thompson, Riley & Ferguson and John M. Riley, San Diego, for appellant.

Russell G. Taliaferro, Escondido, for respondents.

EDMONDS, Justice.

The petition of Harry G. Logan to revoke the probate of the will of Sallie L. Logan, his deceased wife, was denied. The appeal from the judgment subsequently entered requires a construction of the will in connection with the provisions of section 70 of the Probate Code.

There is no controversy as to the facts. In April, 1949, the testatrix obtained an interlocutory decree of divorce from Carl L. Duke. One month later, she executed the will, which has been admitted to probate. By this will she gave the bulk of her es-

tate to her daughter, Leah Jamison Herzer, with an alternative gift to her grandchildren, in the event the daughter should predecease her. Jess O. Shelby, a grandson, was named executor. Her marriage to Logan occurred in May, 1950, and continued until her death in November of 1951.

The will includes the following provision:

"Fourth: I have, except as otherwise specifically provided in this will, intentionally and with full knowledge, omitted to provide for my former husband, Carl L. Duke, and for any child or children, relatives or heirs who may be living at the time of my death, including any person or persons who may, after the date of this will, become my heir or heirs by reason of marriage or otherwise."

As a conclusion of law from the facts which have been stated, the court declared that the will showed on its face the intention of the testatrix to make no provision for Logan by excluding specifically a class of which he is a member.

In the district court of appeal, over the objection of the appellant, the respondents were permitted to offer additional evidence bearing upon the intent of the testatrix. It was stipulated that, in lieu of hearing oral testimony, the affidavits of Leah Jamison Herzer and Jess O. Shelby might be considered.

According to those affidavits, Logan and the testatrix were acquainted for a period of about nine years prior to their marriage. They visited each other's home, both before and after the death of Logan's former wife in February, 1949. In July of that year, he and the testatrix disclosed to the affiants their intention to be married as soon as her divorce became final. This fact was announced publicly the following month.

Logan takes the position that section 70 of the Probate Code prohibited the consideration of extrinsic evidence concerning the intent of the testatrix to make provision for him or to exclude him from her will. Furthermore, he contends, the district court of appeal erred in permitting the introduction of additional evidence on appeal. His

final argument is that, even if the extrinsic evidence properly may be considered, the will cannot be construed as showing an intention of the testatrix not to provide for him.

Section 70 of the Probate Code provides: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

The policy of law which underlies this section has been declared to be the social disfavor toward a testator's failure to provide for a surviving spouse. *Sanders v. Simcich*, 65 Cal. 50, 52, 2 P. 741; *Rundell v. McDonald*, 41 Cal.App. 175, 181, 182 P. 450. As the court said in the *Sanders* case, "[t]he law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will; and does not admit of evidence to the contrary unless provision has been made according to law for wife and children who have survived him." 65 Cal. at page 52, 2 P. at page 742.

[1] At common law, a revocation of a will because of a subsequent change in domestic relations of a testator was based upon his implied intention. See *Estate of Meyer*, 44 Cal.App. 289, 291, 186 P. 393; 1 *Page on Wills* (Lifetime Ed.), § 507 et seq.; *Atkinson, Handbook of the Law of Wills* (1937), § 166, pp. 400-404. In California, the doctrine of implied revocation has been replaced by a statutory presumption of revocation which operates upon the showing that the spouse married the testator after the making of the will and survived the maker. In *re Comassi's Estate*, 107 Cal. 1, 4, 40 P. 15, 28 L.R.A. 414; *Estate of Meyer*, supra, 44 Cal.App. at page 291, 186 P. 393. These things being shown, the will is revoked as to the spouse, regardless of what may have been the wishes of the deceased unless the testamentary docu-

ment includes: (1) provision for the spouse by marriage contract; (2) provision for the spouse in the will; or (3) mention of the spouse therein in such way as to show an intention not to make such provision. § 70, Prob.Code; *Corker v. Corker*, 87 Cal. 643, 648, 25 P. 922; *Estate of Turney*, 101 Cal.App.2d 720, 722, 226 P.2d 80.

There is no contention that Logan was provided for by a marriage contract or in the will. The respondents contend that, by the disinheriting clause of the will, Logan was "in such way mentioned therein as to show an intention not to make such provision." In reply, Logan takes the position that the clause is of the most general nature and cannot be construed as indicating an intention to exclude an after-acquired husband.

Considering the word "mention", as used in this section, this court said in *Estate of Kurtz*, 190 Cal. 146, 210 P. 959: "No reason is perceived why the wife could not be 'mentioned' by any description that would include her. Certainly it would not be necessary to mention her by name and to include her, as she was included, in the description of a class, 'mentions' her as effectually as if she had been named therein." 190 Cal. at page 149, 210 P. at page 960.

Later cases, considering somewhat similar exclusionary clauses, have tended to restrict the broad rule stated in the *Kurtz* decision. An apparent basis for this tendency is the recognition that to permit avoidance of revocation of a will by such generally worded exclusionary clauses as are commonly used for other purposes may subvert the statutory purpose.

Where a will has been executed prior to the marriage, it is probably the unusual case in which a person does so intending either to provide for or to exclude a future spouse. And, although a testator need not make provision for such a spouse, he is required to bear in mind the possibility of a subsequent marriage and the serious changes in domestic relations resulting therefrom. Construing a similar statute, the supreme court of the State of Georgia has said: "The object of the provision is to

secure a specific moral influence upon the testamentary act,—the moral influence of having before the mind a contingent event so momentous as marriage * * *, and so deserving of consideration in framing a testamentary scheme.” *Ellis v. Darden*, 86 Ga. 368, 372, 12 S.E. 652, 653, 11 L.R.A. 51; quoted with approval in *Estate of Meyer*, supra, 44 Cal.App. at page 292, 186 P. 393.

Accordingly, although broad enough to include a spouse, exclusionary clauses which fail to indicate that the testator contemplated the possibility of a later marriage have been held to be insufficient to avoid a revocation of the will. *Estate of Axelrod*, 23 Cal.2d 761, 147 P.2d 1, 2 (exclusion of “all of my heirs who are not specifically mentioned herein”); *Estate of Rozen-Goldenberg*, 1 Cal.App.2d 631, 37 P.2d 132 (exclusion of heirs living at the time of testatrix’s demise); *Estate of Turney*, supra [101 Cal.App.2d 720, 226 P.2d 81] (omission of “my heirs living at the time of my demise”); cf. *Estate of Ryan*, 191 Cal. 307, 311, 216 P. 366, 368 (naming future spouse executrix held insufficient to indicate “that decedent contemplated matrimony” at the time the will was drawn).

A further inquiry, and one which is decisive in this case, is whether to be sufficient such a clause must show that the testator contemplated marriage to a specific person. This question has not been considered in this state but a statute almost identical in wording to Probate Code section 70 was construed in *In re Hall’s Estate*, 159 Wash. 236, 292 P. 401. There the will provided: “I hereby direct that in the event that I should remarry that said remarriage shall in no wise alter or affect the disposition of my property but that * * * my separate property shall be distributed in the manner hereinbefore set forth * * *.” It was further provided that a surviving spouse should receive only the community property.

Although recognizing that the clause did not show that the testatrix had in mind marriage to a particular person, the court held that the clause was sufficient to avoid a revocation of the will. “The words ‘my husband’ spoken in the future tense are as

specific as words commonly used to describe after-born children, and it is a common practice to make provision in wills for any after-born child, which practice we * * * have upheld”. 292 P. 403. In practice, a testator may have good grounds for preferring that his will stand despite any future marriage, and no sound reason is suggested why he may not express his intention by a clause referring to a future spouse in general terms. The *Hall* case is persuasive authority for permitting a testator to do so.

[2] In the will presently under consideration, the testatrix has excluded “any person or persons who may, after the date of this will, become my heir or heirs *by reason of marriage* or otherwise.” (Emphasis added.) By this provision she clearly stated an intention not to provide for a class of persons which necessarily would include a future spouse. In addition, she declared that the classification includes any person who may thereafter become her heir “by reason of marriage”, a phrase which must necessarily refer to *her* future marriage, if it is to be given legal significance. Under such circumstances, the will mentioned a future spouse in such way as to show an intention not to provide for him.

A substantial portion of the briefs of both parties has been devoted to argument concerning the admissibility of extrinsic evidence to establish the testatrix’s intention. This evidence was admitted on the authority of *Estate of Kurtz*, supra.

In that case, the testator disinherited “each and all persons whatsoever claiming to be, and who may be, my heirs at law, except as such may be determined by this will, and if any of such parties or such heirs, or any person whomsoever who, if I died intestate, would be entitled to any part of my estate, shall [attack the will], I hereby give * * * to said person * * * one (\$1.00) dollar * * *.” [190 Cal. 149, 210 P. 960.] The probate court refused to receive extrinsic evidence showing that the will was executed on the day prior to the decedent’s marriage. Upon appeal, the rejection of such evidence was held to be erroneous. “It was admissible for the purpose of showing who the maker of the will intended to include by the phrase ‘any

person whomsoever who, if I died intestate, would be entitled to any part of my estate,' a phrase which, if he had not been then engaged to marry the contestant, would be somewhat ambiguous, but which would be made certain by showing the fact of such engagement. Evidence is always admissible to show extrinsic facts which serve to explain the meaning of ambiguous words appearing on the face of the will, and this evidence was admissible for that purpose." 190 Cal. at page 149, 210 P. at page 960.

Logan argues that the Kurtz case was overruled by Estate of Ryan, *supra*, and Estate of Axcelrod, *supra*. However, neither of these decisions disapproved the Kurtz case, although in Estate of Axcelrod the court expressly withheld approval of that portion of the opinion which sanctioned the taking of extrinsic evidence. In both the Ryan and Axcelrod cases the court was confronted with testamentary language differing from that encountered in Estate of Kurtz, and it very properly distinguished the latter decision upon that basis.

Although the Kurtz decision correctly holds that extrinsic evidence may be received to resolve an ambiguity resulting from uncertain language appearing in a will, Prob.Code, § 105; Estate of Kearns, 36 Cal.2d 531, 537, 225 P.2d 218, the application of the rule to the will involved in that case is questionable. Such words as "heirs at law", "intestate", and the like, rather than presenting an ambiguity concerning whether a testator had in mind the possibility of a future marriage, are merely noncommittal upon the issue. They serve to indicate neither the presence nor absence of such a mental state, and to remedy such omission by resort to extrinsic evidence would be contrary to the express terms of Probate Code, section 70. Cf. Estate of Ryan, *supra*, 191 Cal. at page 310, 216 P. 366; In re Estate of Garraud, 35 Cal. 336, 341-342.

[3] In the present case, no uncertainty appears in the terms of the will by which a future spouse is excluded. Accordingly, extrinsic evidence concerning the testatrix's intention in this regard should not

have been received. However, because such evidence merely tended to support the correct legal conclusion of the trial court concerning the effect of the will, no prejudice resulted to either party.

[4] Logan also appealed from the order denying his motion to vacate the judgment. As no appeal lies from such an order, the latter appeal must be dismissed. Prob.Code, § 1240; see Estate of Winslow, 128 Cal. 311, 312, 60 P. 931; cf. In re Walkerly, 94 Cal. 352, 353, 29 P. 719; In re Seymour's Estate, 15 Cal.App. 287, 288-290, 114 P. 1023.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I reiterate the views expressed in my concurring opinion in Estate of Axcelrod, 23 Cal.2d 761, 769, 147 P.2d 1. The words in the will in the Axcelrod case which are held not sufficient to escape the revocatory effect of marriage after execution of the will were that the testator intentionally omitted all "heirs" not mentioned in the will and expressly disinherited them. In the present case the only words in addition to "heirs" are "heirs by reason of marriage or otherwise." That is not sufficient as the word "heirs" alone would include an heir by marriage as well as by consanguinity and the use of "heirs" alone is not a sufficient mentioning under the Axcelrod case to disinherit a spouse married after the execution of a will. Estate of Kurtz, 190 Cal. 146, 210 P. 959, is to the contrary but that case, although distinguished in the Axcelrod case, was in effect overruled thereby. (See discussion 32 Cal.L.Rev. 213.)

The statute, Probate Code, § 70, provides that if a person is married after the execution of the will, the will is revoked as to the after acquired spouse unless the *spouse* is in such way "mentioned" therein as to show an intention not to make provision for him or her. The latest general definition of "mentioned" is: "As a verb, 'mention' is defined in Webster's New Interna-

tional Dictionary, 2d Edition (1943), as 'To make mention of; to refer to * * * casually; to specify, esp. by name; to name,' and as a noun the word is employed to indicate 'a speaking or notice, esp. in a brief or cursory manner; a specification, usually by name; casual introduction into speech or writing; naming, esp. incidentally.'" Hunt v. Mayor and Council of Riverside, 31 Cal.2d 619, 626, 191 P.2d 426, 430. Specifically applied to section 70, various factors must be considered in determining the sufficiency of the words of mention to escape revocation. Having in mind the words used in Estate of Axcelrod, supra, 23 Cal.2d 761, 147 P.2d 1, 4, the Court there said: "A person who was then a stranger, both in consanguinity and affinity, and whose subsequent relationship was yet to be projected, could scarcely have been considered by the testatrix as an 'heir,' much less, a surviving husband. She said in her will, 'I have intentionally omitted all of my heirs who are not specifically mentioned herein, intending thereby to disinherit them * * *' (Italics added.) Insofar as the operation of section 70 of the Probate Code is concerned her intention is to be determined only as of the date of the execution of the instrument. (See In re Estate of Carter (1942), 49 Cal.App.2d 251, 254, 121 P.2d 540.) A man does not 'omit' the name of his child from a document if he has no child; *a woman does not 'omit' her husband from her will if she has no husband in fact or in contemplation.* * * *

"Mere general phraseology such as that which is employed in the will now before us cannot be construed to mention the appellant—a subsequently acquired husband—in such way * * * as to show an intention not to make' provision for him. He is not mentioned at all. The only word used which could possibly include him is the word 'heirs.' But at the time the will was executed the testatrix had no husband who could become an 'heir.' If she was at that time contemplating marrying anyone it may have been someone other than appellant. The will does not mention appellant by name or by contemplated relationship or otherwise in any way by which he can be identified as a particular person who was in

her mind at that time. Since it does not identify him by name or by contemplated relationship, or designate a classification which shows on its face that it necessarily was then the intention of the testatrix to include therein a subsequently to be acquired husband, it cannot be held that such a subsequently acquired husband has been mentioned. * * *

"It would appear that the intention [if any] to make no provision for the future surviving spouse would have to be set out with greater certainty and explicitness than in the instant case if the revocation provided by section 70 of the Probate Code is to be averted, where, as here, there is no marriage contract and no provision for such survivor in the will.'" Estate of Axcelrod, 23 Cal.2d 761, 767, 147 P.2d 1; emphasis added. In Estate of Turney, 101 Cal.App. 2d 720, 226 P.2d 80, 81, the words used by the testatrix were that she had omitted to provide for "my heirs *living at the time of my demise.*" They were held insufficient to disinherit an after acquired spouse, the Court stating: "A party seeking to rebut the statutory presumption of revocation must bring himself within the *literal* terms of one of the exceptions. See Corker v. Corker, 87 Cal. 643, 25 P. 922; Estate of Smith, 15 Cal.App.2d 548, 59 P.2d 854." Estate of Turney, 101 Cal.App.2d 720, 722, 226 P.2d 80, 82; emphasis added.

To the same effect are Estate of Rozen-Goldenberg, 1 Cal.App.2d 631, 37 P.2d 132, and Estate of Ryan, 191 Cal. 307, 216 P. 366.

From the foregoing it is and should be the rule that there is not sufficient mention of the after acquired spouse to prevent revocation unless, on the face of the will, the prospective spouse is named or if designated by a general term it appears that the testator or testatrix contemplated marriage. This gives meaning and effect to section 70 and prevents its evasion by general words which do not indicate any real intention to disinherit an after acquired spouse because the question was never really given concrete consideration by the testator or testatrix.

I would, therefore, reverse the judgment.

SCHAUER, Justice.

I dissent.

In my view the policy and the express law of this state as enunciated in section 70 of the Probate Code, and as upheld by this court in *Estate of Axcelrod* (1944), 23 Cal. 2d 761, 767-768, 147 P.2d 1, disclose the complete untenability of the majority's discussion and conclusion.

In accord with section 70 and *Estate of Axcelrod I* would reverse the judgment.



41 Cal.2d 483

PEOPLE v. SUTIC.

Cr. 5430.

Supreme Court of California, in Bank.
Sept. 22, 1953.

Defendant was convicted of first degree murder. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment, and defendant appealed. The Supreme Court, Spence, J., held that evidence was sufficient to sustain conviction.

Judgment and order denying motion for new trial affirmed.

1. Homicide $\hookrightarrow$ 22(1)

"Homicide" is murder of first degree when accused, as result of deliberation and premeditation, intends to take unlawfully the life of another. Pen.Code, § 189.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Homicide".

2. Homicide $\hookrightarrow$ 17

Where person purposely and with deliberate and premeditated malice attempts to kill one person but, by mistake or inadvertence, kills another instead, law transfers the felonious intent from object of his assault, and homicide so committed constitutes first-degree murder. Pen.Code, § 189.

3. Homicide $\hookrightarrow$ 268

In prosecution for murder, inconsistencies in evidence concerning time at which shooting occurred and time at which defendant was purportedly seen at service station were matters for jury in view of fact that time references plainly allowed a half hour spread and could be reconciled with distance factors. Pen.Code, § 189.

4. Homicide $\hookrightarrow$ 253(1)

Evidence was sufficient to sustain conviction for first-degree murder, which has been perpetrated by "lying in wait". Pen. Code, § 189.

5. Homicide $\hookrightarrow$ 22(1), 354

Where evidence was sufficient to sustain conviction for first-degree murder, neither trial court nor the Supreme Court would be authorized to reduce degree of crime, nor could imposition of death penalty be successfully assailed. Pen.Code, § 189.

6. Criminal Law $\hookrightarrow$ 814(1)

Jury instructions must be responsive to the issues and are to be determined by the evidence.

7. Homicide $\hookrightarrow$ 309(3)

In prosecution for first-degree murder after shots allegedly fired by defendant into house had killed one of the occupants thereof, evidence, which presented only defenses that defendant was not at scene of shooting at time thereof and did not have gun then in his possession, was not sufficient to warrant giving of instruction concerning manslaughter. Pen.Code, § 189.

8. Criminal Law $\hookrightarrow$ 957(1)

Jurors are legally disabled from impeaching their verdict by any means, whether it be by affidavit, testimony or by extra-judicial statements, except in cases provided by statute.

9. Criminal Law $\hookrightarrow$ 957(2)

Following conviction for first-degree murder upon verdict of guilty without recommendation, one juror could not, by affidavit, impeach verdict on ground that juror had been coerced by other jurors to subscribe to verdict on ground that defendant had been arrested for operating bawdy

house in Oklahoma and that he would get another chance upon Supreme Court's review of evidence.

10. Criminal Law ⇨438

In prosecution for first-degree murder, photographs showing bullet hole in back of deceased boy's head and showing boy lying prostrate, face upward, on morgue slab were admissible as relevant to testimony of medical witnesses concerning condition of body after shooting and to establish gunshot wound as cause of death. Pen.Code, § 189.

11. Criminal Law ⇨1037(1)

In prosecution for first-degree murder, where defendant did not object to prosecution's showing of photographs of deceased boy to his mother nor cite fact that she thereupon wept profusely as misconduct, defendant could not, before the Supreme Court, successfully claim error in the trial court's discretionary handling of such phase of case. Pen.Code, § 189.

12. Criminal Law ⇨1037(1)

In absence of objection thereto in trial court, misconduct of prosecuting attorney cannot be availingly urged upon appeal.

13. Criminal Law ⇨1037(1, 2), 1044

In prosecution for first-degree murder, where, after prosecuting attorney, during his closing argument, had commented upon defendant's failure to testify, defendant did not assign such comments as error, ask that they be stricken, or request that jury be asked to disregard them or that prosecuting attorney be reproofed for misconduct, defendant could not raise such purported error for the first time upon appeal. Pen.Code, §§ 189, 1323; Const. art. 1, § 13.

Willens & Boscoe, Richard J. Gibson and Donald D. Boscoe, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., Chester E. Watson, Dist. Atty., and Richard E. Johnson, Deputy Dist. Atty., Stockton, for respondent.

SPENCE, Justice.

Defendant was charged by information with the murder of Lading Borellano, Jr. He pleaded not guilty. At the trial he neither testified nor produced any witnesses. The jury returned a verdict of first degree murder, without recommendation, based wholly on circumstantial evidence. Motions for a new trial and for a reduction of the verdict to second degree murder were denied. Judgment was thereafter pronounced and the death penalty was imposed. The cause comes to this court upon an automatic appeal. Pen.Code, § 1239, subd. (b).

As grounds for reversal, defendant argues these points: (1) insufficiency of the evidence to sustain the verdict; (2) error in the trial court's refusal to reduce the verdict; (3) error in the trial court's failure to instruct on the crime of manslaughter; (4) misconduct of the jury; and (5) prejudicial misconduct of the deputy district attorney arising from two aspects—the introduction of certain exhibits in evidence and his closing remarks in argument to the jury. An examination of the record compels the conclusion that defendant's arguments are without merit, and the judgment of conviction must be affirmed.

Defendant lived about one-third of a mile from the Borellano family near the city of Manteca. He raised chickens on part of his land, and he sold eggs to the Borellanos. They had been on friendly terms for several months, and defendant was a frequent visitor in the Borellano home. However, some few weeks before the date of the homicide, October 11, 1952, a dispute arose between them over a \$12.50 egg bill, which the Borellanos refused to pay because of an alleged overcharge and the further claim that defendant had tried to poison their dog, with the result that they had incurred a \$9 veterinary bill. According to Mrs. Borellano, defendant came to her home and quarreled with her over the bill, using "harsh words." One of the neighbors testified that about October 1 defendant expressed his intention of calling on the Borellanos to collect the bill, and when it was suggested that they might

"gang up" on him, defendant replied: "I have a gun." Another neighbor testified that defendant, in discussing about that same time the unpaid egg bill, seemed "to get very mad, very red in the face" and said that "he was going to get Borellano; he was going to smash him in the face; he was going to kill him."

On October 11, 1952, about 7:45 p. m. Mr. Borellano and his nine-year old son, the deceased, were driving home from Stockton. As they approached a country lane intersection about one-third of a mile from their home, Mr. Borellano observed defendant sitting in his car, which was parked on the left side of the road facing the Borellanos. It was then about 8:10 p. m. The headlights of both cars were burning, so that Mr. Borellano, traveling about 25 miles per hour, recognized defendant and his car, which was distinctively painted—a cream-yellow body with lighter-colored fenders. Within a few minutes the Borellanos reached home. Mr. Borellano put his car in the garage, and then he and his son prepared for bed. Mr. and Mrs. Borellano occupied the front bedroom, an enclosed porch with two large windows facing the roadway. The children slept in an adjoining room, the deceased occupying the upper bunk of a double bunk bed, which was next to the partition separating the parents' sleeping quarters from the children's bedroom. Mrs. Borellano had already retired, and Mr. Borellano extinguished the lights in the house at 8:25 p. m.

The Borellano home was a small three-bedroom house set back from the roadway some 50 feet. A sparse hedge approximately 5 feet high extended along the shoulder of the road in front of the house. The distance between the house and the hedge was about 34 feet, and a car could drive alongside the hedge. About 8:30 p. m., as Mr. and Mrs. Borellano were lying in bed but not asleep, they heard a car stop in front of the house. Mr. Borellano raised up in bed, pulled aside the curtains of the window directly overhead, and saw a car parked with the headlights burning. He recognized the car from its color as belonging to defendant, and he called to his wife: "John's (defendant) there. I don't know

what is he want. How come he park there." At that moment of Mr. Borellano's parting of the curtains as he looked out the window, two shots were fired in rapid succession, and Mr. Borellano hollered "John's shooting." Defendant's car then left the scene. The first bullet struck Mr. Borellano in his left arm; the second bullet, traveling through the front bedroom into the children's room, lodged in the head of the deceased as he slept in his upper bunk, causing his death a few hours later in the hospital where he was taken for treatment.

An attendant at a nearby service station testified that defendant drove his car into the station somewhere around 8:30 p. m.; that he turned in "rather fast," nearly hitting a gas pump; that he was a regular customer but had never before come so late in the evening, as he always said that he was afraid to drive after dark; that he purchased some gasoline and left a flashlight to be repaired; that he then went to the lunch counter on the premises for some coffee, and while sitting there on a stool "side-ways" instead of "straight as anybody else would," he kept a constant watch on the corner intersection; and that he stayed there about 15 or 20 minutes. The proprietor of the service station corroborated this account of defendant's visit and the approximate time thereof. Defendant drove out of the station in the direction of his home.

Meanwhile Mrs. Borellano had reported the shooting to the sheriff's office and about 9:00 p. m. two deputies arrived at her home. They noted that the front wall of plywood sheeting had been penetrated by two bullets, one hole being below the casing of the window about 4 feet above the ground and the other hole above the casing. One bullet from a .38 caliber gun was found at the end of the bedspread in the Borellanos' front bedroom; the second bullet was removed from the skull of the deceased at the time of the autopsy the next day. Mrs. Borellano told the officers that defendant was a possible assailant, and the officers then proceeded to his home, about one-third of a mile away, arriving there at approximately 10:40 p. m.

Defendant lived in a small two-room cabin. As the officers entered the driveway of his property, a light which was burning in the cabin was extinguished. Leaving the lights of their patrol car burning, the officers knocked on the cabin door and took turns calling out that they were "sheriff's officers" and "would like to talk" to defendant. The officers so continued for some 20 minutes but defendant did not answer. Defendant's arrest was finally accomplished as he emerged from the doorway after the officers had thrown a can of tear gas through a hole broken in the front door. When the officers asked the reason for his failure to answer their first calls to him, defendant said that he was asleep and hard of hearing; and that then when their noise finally did awaken him, he thought that he was being taunted by hoodlums in the neighborhood. He "cussed" the officers for using tear gas and when asked if he had a gun, defendant replied that he did not but "if I had one, I would have shot it out with you." Defendant stated that he had had two guns but they were stolen, one in July, 1952, and the other the preceding December, both Smith and Wesson .38 type. In defendant's cabin and likewise in the trunk of his car, which was in the garage, there were found boxes containing .38 shells. Defendant admitted that he knew the Borellanos, and he made some derogatory remarks about the family. He further added that their dog was "killing my chickens"; that he had given the dog "some sleeping pills, made him sick" but did not poison him. When asked as to his whereabouts that evening, defendant stated that he had been home since 6:00 p. m. One of the officers noticed that the radiator of defendant's car was still warm. When questioned about this, defendant stated that he had gone into the yard to feed his dogs about 9:30 or 10:00 p. m., and he had turned on his car lights to see and had run his motor to conserve the battery.

In a statement to a police officer a few days later, defendant gave this account of his activities on October 11: that after finishing work about 4:30 p. m. he drove to a bar for some drinks, continued to a

friend's house for more drinks, went to the service station where he bought gasoline and had some coffee, reached home at 7:00 p. m., and did not go out again that evening. Defendant repeated that his two guns had been stolen, admitted that he had shells in his cabin but denied knowledge of any in his car. A witness for the prosecution testified that defendant in May or June, 1952, showed her a gun which he was carrying in his pocket, and that he then said that he had another gun in his cabin. Upon the testimony of the proprietor of a sporting goods store in Portland, it was established that defendant had there bought on April 18, 1951, two .38 Smith and Wesson revolvers and had signed the required police records covering such purchase. A state criminologist identified the two bullets which respectively struck Mr. Borellano and his son, the deceased, as fired from a .38 caliber Smith and Wesson revolver. No gun was introduced in evidence. The doctor who performed the autopsy testified that his examination of the deceased's head disclosed the bullet in evidence, and that the death was due to the bullet's laceration of the brain.

In this state of the record, with the evidence clearly showing that a murder had been committed and pointing directly at defendant as the perpetrator of the crime, defendant failed to take the stand to deny or explain, if he could, any of the numerous circumstances which indicated his guilt. Nor did defendant present any witnesses on his behalf or offer any instructions. The theory of the defense, appearing from the extrajudicial statements made by defendant to the investigating police officers and presented as part of the prosecution's case, rested on the sole claim that defendant was not at the scene of the shooting but was at home at that time, and furthermore, he did not then possess any guns, as they had been previously stolen. As above stated, the jury found defendant guilty of murder in the first degree, without recommendation. Defendant then moved for a new trial on the statutory grounds or for reduction of the degree of the crime on the claim that the evidence was insufficient to indicate that

he had the requisite intent to justify a verdict of first degree murder. Both motions were denied.

The first question presented is whether the evidence is sufficient to support a conviction of murder in the first degree. The instructions authorized the jury to return a verdict of first degree murder on one or both of two theories: the murder was willful, deliberate, and premeditated, or it was perpetrated by means of lying in wait.¹ There is substantial evidence to support both theories.

[1, 2] A homicide is murder of the first degree when the accused, as the result of deliberation and premeditation, intended to take unlawfully the life of another. Pen. Code, § 189; *People v. Martinez*, 38 Cal.2d 556, 561, 241 P.2d 224. There is ample evidence of deliberation and premeditation here. Some two weeks before the shooting defendant had a quarrel with the Borellanos over an unpaid egg bill, had used "harsh words" in discussing it with Mrs. Borellano, and had poisoned their dog. He had made verbal threats before disinterested parties that he intended to kill Mr. Borellano, and in the course of such conversations defendant admitted that he had a .38 caliber revolver. Prior to their quarrel defendant had frequently visited the Borellanos' small home and was familiar with the interior, including the family's sleeping arrangements. Defendant was positively identified by Mr. Borellano as sitting alone in his car parked on the road on the evening in question, a short distance from the Borellano home. Some 15 or 20 minutes later after all lights had been extinguished in the Borellanos' home, the shooting occurred when Mr. Borellano looked out the bedroom window and saw defendant's car stopped in front. From these circumstances clearly pointing to defendant's shooting at Mr. Borellano in consequence of some two weeks' brooding over a fancied grievance with the Borellano family, the jury could justifiably conclude that

the killing was deliberate and premeditated. The fact that not Mr. Borellano but rather his son was killed does not alter the situation. "Where a person purposely and of his deliberate and premeditated malice attempts to kill one person, but by mistake or inadvertence kills another instead, the law transfers the felonious intent from the object of his assault, and the homicide so committed is murder in the first degree". *People v. Suesser*, 142 Cal. 354, 367, 75 P. 1093, 1098; *People v. Pivaroff*, 138 Cal.App. 625, 628, 33 P.2d 44. See, also, *People v. Walker*, 76 Cal.App.2d 10, 14, 172 P.2d 380.

[3] Defendant cites certain time variances as inconsistent with his presence at the scene of the homicide: the shooting having occurred at or about 8:30 p. m. and yet he was purportedly seen at a service station about a mile from the Borellanos' home between 8:30 and 9:00 p. m. that evening. But the time references plainly allowed a half hour spread and could be reconciled with the distance factors. These were matters for the jury's consideration. *People v. Mandell*, 48 Cal.App.2d 806, 813, 120 P.2d 921. Particularly significant is the jury's apparent disbelief of defendant's assertion to the police officers at the time of arrest that he had not been out of his house since 6:00 p. m. that evening. Under the circumstances the evidence amply establishes defendant's guilt of the killing in question, *People v. Green*, 13 Cal.2d 37, 42, 87 P.2d 821, and its classification as a deliberate and premeditated act. *People v. Dessauer*, 38 Cal.2d 547, 550, 241 P.2d 238; *People v. Martinez*, supra, 38 Cal.2d 556, 561, 241 P.2d 224; *People v. Gilliam*, 39 Cal.2d 235, 238-239, 246 P.2d 31.

The evidence also supports the theory that the murder was perpetrated by means of "lying in wait" and was murder of the first degree by force of the statute. Pen. Code, § 189. Defendant argues that the term contemplates a concealment for the purpose of taking the victim unawares, *People v. Tuthill*, 31 Cal.2d 92, 100, 187

1. Penal Code, section 189 provides: "All murder which is perpetrated by means of * * * lying in wait * * * or by any

other kind of wilful, deliberate, and premeditated killing * * * is murder of the first degree".

P.2d 16, and that here Mr. Borellano testified that he had seen defendant sitting in his car on the open road some 15 minutes before the fatal shooting at the Borellanos' home. However, the cited case expressly states that the term has been applied to "a number of factual situations wherein the victim has been aware of the physical presence of the aggressor", 31 Cal.2d at pages 100-101, 187 P.2d at page 21, and is not limited only to instances of "concealment in ambush." The elements of "waiting, watching, and secrecy all were present" here, from which the jury could infer that the "lying in wait" was a part of defendant's plan to take his victim later by surprise. Accordingly, that issue was properly submitted to the jury under instructions similar to those approved in the Tuthill case, 31 Cal.2d at pages 99-100, 187 P.2d at page 21.

[4,5] As above discussed, the evidence fully justified the jury's finding that the homicide was the result of defendant's intent to kill and was accomplished by his "lying in wait" until the opportune time to strike, or that the homicide was a "wilful, deliberate, and premeditated" act, without finding as to "lying in wait". In either event it was murder in the first degree. Pen.Code, § 189; *People v. Gibson*, 92 Cal. App.2d 55, 70, 206 P.2d 375. Under such circumstances neither the trial court nor this court would be authorized to reduce the degree of the crime. *People v. Daugherty*, 40 Cal.2d 876, 256 P.2d 911. Nor can the imposition of the death penalty be successfully assailed. *People v. Jackson*, 36 Cal.2d 281, 288, 223 P.2d 236; *People v. Thomas*, 37 Cal.2d 74, 77, 230 P.2d 351.

[6] The trial court did not err in failing of its motion to give an instruction on the crime of manslaughter. As above indicated, defendant did not himself offer any instructions. He now argues that there was evidence from which it could be inferred that the Borellanos' assailant discharged the shots into their home with intent only to frighten the occupants, and not to kill. In such event he claims that he could be found guilty only of involuntary manslaughter. *People v. McGee*, 31 Cal.

2d 229, 238, 187 P.2d 706. However, "jury instructions must be responsive to the issues" and they "are determined by the evidence." *People v. Carmen*, 36 Cal.2d 768, 772-773, 228 P.2d 281, 284. Here there was no evidence to support the theory of manslaughter. The only defense presented in any manner by the record was defendant's claim to the arresting officers that he was not at the scene of the shooting but was at home that entire evening, and further that he had no guns then in his possession because they had previously been stolen. With strong evidence presented by the prosecution and pointing to him as the perpetrator of the crime in carrying out a deliberate and premeditated design to kill, defendant neither took the witness stand nor made any showing that the killing was committed in the heat of passion, *People v. Best*, 13 Cal.App.2d 606, 608-610, 57 P.2d 168, or for the purpose of frightening the Borellanos. *People v. McGee*, supra, 31 Cal.2d 229, 238, 187 P.2d 706; *People v. Carmen*, supra, 36 Cal.2d 768, 773-776, 228 P.2d 281.

[7] Defendant suggests that since the shooting was done from a car parked alongside the hedge behind which the Borellanos' home was set back 34 feet, it could reasonably be inferred that the assailant was merely firing two random shots in the general direction of the house with no intent to kill. But the accuracy with which the shots were fired clearly shows that precise aim was taken. The first shot was not fired until after Mr. Borellano had pulled aside the curtain of his bedroom window, and he was struck in the arm; the second shot was directed higher, above the casing, so that it could have been expected to hit Mr. Borellano in the head, but instead it traveled until it penetrated the head of the deceased as he slept in his upper bunk in the adjoining room. Upon such a record defendant was either guilty of murder or not guilty of any crime, if the jury should believe his defense of physical absence from the scene of the homicide. There was no evidence upon which a manslaughter conviction could be based, and therefore an instruction on that subject was inapplicable. *People v. Alcalde*, 24 Cal.2d 177, 188, 148

P.2d 627; *People v. Mandell*, supra, 48 Cal.App.2d 806, 817, 120 P.2d 921; *People v. Gibson*, supra, 92 Cal.App.2d 55, 71, 206 P.2d 375; *People v. Stembridge*, 99 Cal. App.2d 15, 21, 221 P.2d 212. As was said in the Stembridge case, 99 Cal.App.2d at page 21, 221 P.2d at page 215: "The jury was fully instructed as to the crime of murder and were told in effect that if they were not satisfied that the defendant was guilty of that offense they must acquit him altogether. It is to be presumed that the jury heeded the court's instruction in this respect and performed their whole duty in accordance with it; that if they were not satisfied beyond a reasonable doubt that the defendant was guilty of murder, under the instructions they would have acquitted him. *People v. Watts*, 198 Cal. 776, 796, 247 P. 884." In passing, it might be mentioned that defendant's manslaughter claim is a new point presented on appeal. He made no reference to it at the time of his motion for a new trial or for the reduction of the degree of the offense to second degree murder.

[8,9] Defendant complains of misconduct on the part of the jury. It appears from the record that after some two and a half hours' deliberation, the jury returned and the foreman announced the verdict as murder in the first degree, without recommendation. The jury was then polled and one member expressed doubt as to full understanding of the meaning of the verdict. The court thereupon ordered the jury to deliberate further. About an hour later the jury returned with the same verdict, and the poll showed the unanimous agreement of all the jurors thereon. Now by an affidavit (lodged with this court a few days prior to oral argument) the originally doubtful juror claims that on the jury's return for the second deliberation, she was coerced by the other jurors to subscribe to the original verdict; that they represented that defendant was "no good anyway because he had been arrested for operating a bawdy house in Oklahoma," according to one of the exhibits in evidence, and that "he would get another chance because the Supreme Court would review the evidence."

Defendant's previous conviction for operating a disorderly house, a misdemeanor, appeared from a questionnaire which he had executed for the police department. No objection was made to the introduction of the questionnaire in evidence as an exemplar of defendant's handwriting in comparison with that on the fingerprint card and on the gun purchase records executed by defendant in Oregon. Defendant makes no claim that the questionnaire was offered by the prosecution in bad faith but simply argues that it was "highly prejudicial" on a record where the evidence of guilt is wholly circumstantial. However, "it is well settled that jurors are legally disabled to impeach their verdict by any means, whether it be by affidavit or by testimony or by extrajudicial statements, except only in the cases provided by statute." *People v. King*, 40 Cal.App.2d 137, 143, 104 P.2d 521, 524, and cases there cited. The facts on which defendant relies do not come within the exception. See *People v. Giminiani*, 45 Cal.App.2d 535, 539-540, 114 P.2d 392.

[10,11] Defendant finally makes the claim of prejudicial misconduct on the part of the deputy district attorney. In this connection he first argues the impropriety of the introduction in evidence of two photographs of the deceased, one showing the back of the boy's head with the bullet hole and the other showing him lying prostrate, face upward, on a slab in the morgue. The photographs were used for identification purposes by the doctors who treated the boy at the hospital on the night of the shooting and also by the autopsy surgeon with reference to his examination the next day. They were put in evidence without objection by defendant and, in fact, defendant's counsel acquiesced therein. They were admissible as relevant to the testimony of the medical witnesses with regard to the condition of the deceased's body after the shooting and the establishment of the gunshot wound as the cause of death. *People v. Osborn*, 37 Cal.2d 380, 383, 231 P.2d 850, and cases there cited. Later the photographs were shown to the deceased's mother, who wept profusely upon identifying them. Defendant made no objection to

such showing to her nor was such action cited as misconduct. Now he claims that the jury after seeing the mother's emotional reaction could not dispassionately consider the case. But the photographs had evidentiary value in the presentation of the medical testimony, the procedure of their identification by the deceased's mother was not challenged by defendant, and he cannot now successfully claim error in the court's discretionary handling of this phase of the case. *People v. Guldbrandsen*, 35 Cal.2d 514, 521-522, 218 P.2d 977; *People v. Agnew*, 77 Cal.App.2d 748, 763, 176 P.2d 724.

[12,13] Defendant next complains of prejudicial remarks made by the deputy district attorney during his closing argument to the jury. He lists several instances where comment was made on defendant's failure to testify. Such references are authorized by both our Constitution and our statute, Const. Art. I, § 13, as am. 1934; Pen.Code, § 1323, and defendant made no objection thereto in the trial court. In the absence of such objection, it is the general rule that misconduct of the prosecuting attorney cannot be availingly urged on appeal. *People v. Adamson*, 27 Cal.2d 478, 494, 165 P.2d 3, and cases there cited. Moreover, in the majority of instances these comments were properly limited to specific parts of the evidence that defendant could reasonably be expected to explain or deny. In its instructions the trial court expressly recognized defendant's constitutional right not to be compelled to testify and that his failure to explain or deny any evidence against him did not relieve the prosecution of its burden of proving every essential element of the crime and defendant's guilt beyond a reasonable doubt. Defendant also cites various remarks by the deputy district attorney as "inflammatory" and "intemper-

ate." Without detailing the assailed language, suffice it to say that the remarks were in the main statements of the evidence or reasonable inferences drawn therefrom, and they did not transcend the bounds of permissible argument. At the time they were made defendant did not assign them as error or ask that they be stricken, or request that the jury be asked to disregard them or that the deputy district attorney be reprovved for misconduct. Furthermore, the trial court during the course of the trial and in its instructions admonished the jury that it was to be governed solely by the evidence introduced in the case and not by statements made by counsel. Under the circumstances defendant's belated criticism cannot now prevail. *People v. Codina*, 30 Cal.2d 356, 362, 181 P.2d 881; *People v. Amaya*, 40 Cal.2d 70, 251 P.2d 324. It may be noted that the trial court in ruling on defendant's motion for a new trial specifically found that "there was no reversible misconduct on the part of the deputy district attorney nor is there any reason to believe that the jury was moved by passion and prejudice."

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring).

Upon the facts of this case I concur in the judgment and generally in the reasoning leading to the conclusion.

I do not join in the implied blanket approval of all the instructions said to have been "approved in the Tuthill case" (referring to *People v. Tuthill* (1947), 31 Cal.2d 92, 99-101, 187 P.2d 16).

41 Cal.2d 521

**OAKLAND MEDICAL BLDG. CORP.
v. AUREGUY.
S. F. 18883.**

Supreme Court of California, in Bank.
Sept. 25, 1953.

Action was brought on a note. The Superior Court of San Francisco County, Edward Molkenbuhr, J., entered judgment on the pleadings for plaintiff, and defendant appealed. The Supreme Court, Traynor, J., held that alleged oral agreement, on which defendant relied, did not render delivery of note conditional under statute providing that as between immediate parties, and as regards a remote party other than a holder in due course, delivery may be shown to have been conditional.

Judgment affirmed.

Prior opinion, 256 P.2d 659.

1. Bills and Notes ⚡452(1)

Ordinarily, in absence of fraud, mistake, or lack or failure of consideration, a prior or contemporaneous oral agreement that a note is not to be payable according to its terms constitutes no defense to an action on the note. Civ.Code § 1625; Code Civ.Proc. § 1856.

2. Evidence ⚡420(7)

Statute providing that as between immediate parties, and as regards a remote party other than a holder in due course, delivery of instrument may be shown to have been "conditional", does not include conditions which concede transfer of property in instrument and merely restrict source of payment. Civ.Code § 3097.

See publication Words and Phrases, for other judicial constructions and definitions of "Conditional".

3. Evidence ⚡420(7)

Alleged oral agreement between officer and principal stockholder of two corporations and first corporation's creditor that second corporation would advance \$5,000 to creditor and that \$5,000 was to be repaid by creditor only on receipt by him of \$10,000 owing him by first corporation did not render delivery of \$5,000 note to second corporation for \$5,000 advance "conditional" within meaning of statute providing

that as between immediate parties, and as regards a remote party other than a holder in due course, delivery of instrument may be shown to have been "conditional". Civ. Code, § 3097.

4. Corporations ⚡1

Where officer and principal stockholder of two corporations entered into alleged oral agreement with first corporation's creditor that second corporation would advance \$5,000 to creditor and that \$5,000 was to be repaid by creditor only on receipt by him of \$10,000 owing him by first corporation, and in action on note by second corporation against administratrix of creditor, administratrix did not allege that first corporation was second corporation's alter ego and did not allege abuse of separate corporate entity privilege, corporations would not be treated as one, since to do so would prejudice rights of minority stockholders of second corporation in favor of those of first corporation.

5. Bills and Notes ⚡97(1)

Where officer and principal stockholder of two corporations entered into alleged oral agreement with first corporation's creditor that second corporation would advance \$5,000 to creditor and that \$5,000 was to be repaid by creditor only on receipt by him of \$10,000 owing him by first corporation, and second corporation advanced \$5,000, and creditor delivered his \$5,000 note to second corporation, failure of first corporation to pay creditor the \$10,000 did not constitute a failure of consideration and did not preclude recovery by second corporation on \$5,000 note.

W. A. Lahanier and John F. Gallen, San Francisco, for appellant.

Marcel E. Cerf, Robinson & Leland and Emmet B. Hayes, San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff brought this action against the administratrix of the estate of Eugene Aureguy to enforce payment of a negotiable promissory note for \$5,000 executed by

decedent and made payable to plaintiff. The note was executed on November 5, 1948, and by its terms was payable on February 5, 1949. Judgment was entered on the pleadings for plaintiff, and defendant has appealed. The only question presented is whether an alleged oral agreement made contemporaneously with the execution of the note would, if proved, constitute a defense to the action. Defendant's answer alleged the following facts. Edmund Herscher was an officer and principal stockholder of both plaintiff and Andrew Williams Stores, Inc., and was the duly authorized agent of both corporations in their dealings with decedent. On November 5, 1948, Andrew Williams Stores owed decedent \$10,000 for services rendered, and "Edmund Herscher, representing to said decedent that he was acting on behalf of both corporations * * * promised and agreed that the sum of \$5,000.00 would be advanced to said decedent by the Oakland Medical Building Corporation, to be repaid to said corporation by said decedent only upon receipt by said decedent of the \$10,000.00 then owing to decedent from Andrew Williams Stores, Inc. * * * [P]ursuant to said representation, promise and agreement, and in reliance thereon, said decedent accepted said sum of \$5,000.00 and executed a note therefor." No part of the \$10,000 has been paid.

[1-3] Ordinarily, in the absence of fraud, mistake, or a lack or failure of consideration, a prior contemporaneous oral agreement that a promissory note is not to be payable according to its terms constitutes no defense to an action on the note. *Bank of America, etc., Ass'n v. Pendergrass*, 4 Cal.2d 258, 263, 48 P.2d 659; *Alameda County Title Ins. Co. v. Panella*, 218 Cal. 510, 513-514, 24 P.2d 163; *Pierce v. Avakian*, 167 Cal. 330, 332-333, 139 P. 799; *Lindemann v. Coryell*, 59 Cal.App. 788, 791-793, 212 P. 47; see also, *In re Estate of Gaines*, 15 Cal.2d 255, 264-265, 100 P.2d 1055; *Civ.Code*, § 1625; *Code Civ.Proc.* § 1856; 9 *Wigmore on Evidence*, 3d Ed., § 2444, p. 143. Defendant contends, however, that the alleged oral agreement in this case shows that the delivery of the

note was conditional. Section 3097 of the Civil Code provides in part that "As between immediate parties, and as regards a remote party other than a holder in due course * * * the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument." The meaning of this provision was considered in *McArthur v. Johnson*, 216 Cal. 580, 15 P.2d 151, 152. In that case the trial court admitted parol evidence and found that "'* * * Said note was delivered by the defendant to the plaintiff upon the understanding and condition that said note was to be paid wholly and solely from commissions that might thereafter become due to the plaintiff and the defendant in connection with their joint efforts in the sale of real property in Imperial County, California. * * *'" In reversing the judgment the court stated, "We are of the view that this finding does not bring into operation the above-quoted provision of the statute. By the use of the phrase 'and not for the purpose of transferring the property in the instrument' is clearly meant the right to set up by parol conditions that will defeat the passage of the beneficial interest in the instrument, but this does not include conditions which concede the transfer of the property in the instrument and merely restrict the source of payment. Repeated holdings of other courts may be found making similar application of a provision of the Uniform Negotiable Instruments Act, which is identical with our own statute. 5 Uniform Laws Annotated, vol. 5, Negotiable Instruments Act, § 16, p. 97." 216 Cal. at pages 582-583, 15 P.2d at page 152; see also, *Security First Nat. Bank v. Rospaw*, 107 Cal.App.2d 220, 223, 237 P.2d 76; *Van Fleet-Durkee, Inc., v. Oyster*, 91 Cal.App. 2d 411, 413, 205 P.2d 32. The oral agreement pleaded in the answer in this case is legally indistinguishable from that in the *McArthur* case, and accordingly, could not render the delivery of the note conditional under section 3097.

[4] Defendant contends that the alleged oral agreement shows, either that there was

no consideration for the note, or that the consideration has failed because the Andrew Williams company has not paid the \$10,000 owed by it. If it were alleged that the Andrew Williams company was the alter ego of plaintiff, the first of these contentions would have merit. In such case, plaintiff would in effect have been paying a part of its own indebtedness, there would be no consideration for the note, and it might also reasonably be contended that the note was intended only as a receipt. See *Richardson v. Lamp*, 209 Cal. 668, 670, 290 P. 14; *P. A. Smith Co. v. Muller*, 201 Cal. 219, 222-223, 256 P. 411; *Boies v. Wylie*, 113 Cal.App.2d 243, 246-247, 248 P.2d 76; *Cooper v. Cooper*, 3 Cal.App.2d 154, 158, 159, 39 P.2d 820; *Allen's Collection Agency v. Lee*, 73 Cal.App. 68, 73, 238 P. 169. Defendant did not allege, however, that the Andrew Williams company was plaintiff's alter ego. She alleged only that Herscher was the principal stockholder of both corporations. There are no allegations indicating any abuse of the separate corporate entity privilege, and to treat the two corporations as one for the purposes of this action would result in prejudicing the rights of the minority stockholders of plaintiff in favor of those of the Andrew Williams company.

[5] If decedent had executed the note in exchange for an undertaking on plaintiff's part to collect his debt from the Andrew Williams company for him, there would be merit in the contention that the consideration has failed. In such case he would not have received what he bargained for. See *Muir v. Hamilton*, 152 Cal. 634, 636, 93 P. 857; *Jefferson v. Hewitt*, 103 Cal. 624, 630, 37 P. 638; *Harper v. French*, 29 Cal.App.2d 214, 216-217, 84 P.2d 216; *Benjamin Moore & Co. v. O'Grady*, 9 Cal.App.2d 695, 699, 50 P.2d 847. Decedent did not execute the note in consideration of any such undertaking, however, but in exchange for \$5,000, which he received. Under these circumstances the failure of the Andrew Williams company to pay its alleged debt did not constitute a failure of consideration. *Lompoc Valley Bank v. Stephenson*, 156 Cal. 350, 351, 104 P. 449; *Seth v. Lew Hing*, 125 Cal.App.

729, 736-737, 739-740, 14 P.2d 537, 15 P.2d 190; *College Nat. Bank v. Morrison*, 100 Cal.App. 403, 407, 280 P. 218.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



41 Cal.2d 530

Ex parte MASCHING.

Cr. 5436.

Supreme Court of California, in Bank.

Sept. 25, 1953.

As Modified on Denial of Rehearing

Oct. 22, 1953.

Habeas corpus proceeding to secure petitioner's release from custody under commitment by Municipal Court to jail for service of sentence on conviction of driving vehicle while under influence of liquor. The Supreme Court, Gibson, C. J., held that where petitioner appeared without counsel when his case was called for trial, and informed trial court that he had been confined to bed for three weeks and would like a chance to get witnesses and counsel, but court rejected his uncontradicted explanation and summarily denied his request for continuance, ordering trial to commence at once, such procedure amounted to a denial of petitioner's constitutional right to counsel, and invalidated conviction, and that, the conviction being invalid, petitioner would be remanded to custody for further proceedings in Municipal Court in conformity with right to counsel.

Petitioner remanded to custody.

Prior opinion 252 P.2d 959.

1. Habeas Corpus ☞4

Defendant who had exhausted his remedy of appeal was entitled to use habeas corpus to test whether he was deprived of a fundamental right guaranteed by Constitution.

2. Criminal Law ☞641(1)

Constitutional right of party accused to appear and defend in person and with counsel extends to persons charged with misdemeanors. Pen.Code, §§ 858, 987; Const. art. 1, § 13.

3. Habeas Corpus ☞83

Where return to writ of habeas corpus incorporated by reference record of Appellate Department of Superior Court, including a transcript of proceedings before Municipal Court, and it was stipulated that petition could be treated as a traverse to return, return was to be considered as a complaint and petition as an answer, and new matter set up in petition which tended to invalidate apparent effect of process set forth in return would be deemed denied and required to be proved by petitioner.

4. Habeas Corpus ☞83

In original habeas corpus proceeding, respondent is not required to file, in addition to return, a pleading specifically denying the affirmative allegations of the petition when it is treated as a traverse.

5. Criminal Law ☞641(1)

Where accused appeared without counsel when his case was called for trial, and informed trial court that he had been confined to bed for three weeks and that he would like a chance to get witnesses and counsel, but court rejected accused's uncontradicted explanation and summarily denied his request for continuance, ordering trial to commence at once, such procedure amounted to denial of accused's constitutional right to counsel, and invalidated conviction. Pen.Code, §§ 858, 987; Const. art. 1, § 13.

6. Habeas Corpus ☞109

In habeas corpus proceeding wherein it appeared that petitioner's conviction was invalid because of denial of his constitutional right to counsel, petitioner would be remanded to custody for further proceedings in conformity with his right to counsel. Pen.Code, §§ 858, 987; Const. art. 1, § 13.

1. The hearing was granted upon application made by petitioner pursuant to section 1506 of the Penal Code, as amended in 1951, which provides that in all criminal cases the defendant or the People may apply to the Supreme Court for a hearing after a decision by a District Court of Appeal in a habeas corpus proceeding. Cf. *In re Alpine*, 203 Cal. 731,

Morris Lavine, Los Angeles, for petitioner.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and Philip E. Grey, Deputy City Atty., Los Angeles, for respondent.

GIBSON, Chief Justice.

Petitioner was convicted in the municipal court of violating section 502 of the Vehicle Code, which provides that driving a vehicle upon a highway while under the influence of intoxicating liquor is a misdemeanor, and the judgment was affirmed on appeal to the appellate department of the superior court. The validity of the judgment of conviction is attacked in this habeas corpus proceeding on the grounds that petitioner was denied the right to be represented by counsel, that he was deprived of the right to a jury trial, and that the sentence imposed upon him is illegal. The District Court of Appeal issued a writ of habeas corpus and subsequently discharged it, and a petition for hearing was then granted by this court.¹ We have determined that the conviction was improper because petitioner was denied his right to counsel, and, accordingly, it is unnecessary to decide the other questions which he has raised.

[1, 2] Petitioner has exhausted his remedy of appeal, and he may use habeas corpus to test whether he was deprived of a fundamental right guaranteed by our Constitution. In *re Bell*, 19 Cal.2d 488, 493, 495, 122 P.2d 22. The California Constitution provides that in criminal prosecutions in any court the party accused shall have the right to appear and defend in person and with counsel.² Cal.Const. art. I, § 13. The right conferred by this provision extends to persons charged with misdemeanors. See *In re Jingles*, 27 Cal.2d 496, 498, 165 P.2d 12.

745, 265 P. 947, 58 A.L.R. 1500; *In re Page*, 214 Cal. 350, 354-358, 5 P.2d 605.

2. The constitutional requirement is supplemented by provisions of the Penal Code. Section 858 provides: "When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having com-

The record in the municipal court shows that an automobile driven by petitioner collided with a streetcar on May 10, 1952, and that two days later a complaint was filed against him. The minutes of the municipal court recite that on May 13 petitioner, appearing "in pro per," was "duly arraigned, informed of the charge against him and of his legal rights," that he "enters his plea of not guilty" and that he "personally demands jury trial." The trial was set for June 12, and the case was called on that day in division 7. Petitioner appeared without counsel, and according to the reporter's transcript the following occurred:

"The Court: Do you want this matter continued and for what purpose?

"Defendant Masching: Well, sirs, I have been confined to bed for the last three weeks and I would like a chance to get my witnesses, and also counsel.

"The Court: You have had plenty of time to do that. Motion denied. The matter will be sent out for trial."

The minutes of division 7 for June 12 recite: "Defendant's motion to continue denied. Defendant waives jury trial. Transferred to Division 6 for trial."

Petitioner, tried on the same day before a judge without a jury, was found guilty and sentenced to be imprisoned in the city jail for 180 days. The sentence was suspended, and he was placed on probation for a period of three years on condition that he spend the first 170 days of the probationary term in jail.

Petitioner alleges that as a result of the accident he was confined in bed for three weeks with fractured ribs and a head injury, that during that period he was unable to secure an attorney or arrange to subpoena witnesses, that he was without funds to hire counsel and that a few days before trial he sought assistance from the public defender but was informed that this offi-

cer did not represent persons charged with driving while intoxicated. Petitioner further alleges that he at no time waived his right to counsel, that no attorney was appointed to aid him although a deputy public defender and other attorneys were present in the courtroom at the time of his trial, and that he was not sufficiently acquainted with legal procedure to know that he had to do anything other than request a continuance for time to obtain an attorney.

[3,4] The return to the writ incorporates by reference the record of the appellate department of the superior court, including a transcript of the proceedings before the municipal court, and it has been stipulated that the petition may be treated as a traverse to the return. Accordingly, the return is to be considered as a complaint and the petition as an answer, and new matter set up in the petition which tends to invalidate the apparent effect of the process set forth in the return is deemed denied and must be proved by the party alleging it, namely, the petitioner. In *re Egan*, 24 Cal.2d 323, 330, 149 P.2d 693; In *re Collins*, 151 Cal. 340, 342-343, 90 P. 827, 91 P. 397; see In *re Oxman*, 100 Cal.App.2d 148, 150, 223 P.2d 66. As pointed out in the *Collins* case, the respondent is not required to file, in addition to the return, a pleading specifically denying the affirmative allegations of the petition when it is treated as a traverse. 151 Cal. at pages 342-343, 90 P. 827. However, even if we disregard the allegations which are not admitted by the return, the record plainly demonstrates that petitioner was improperly deprived of counsel.

It should be noted at the outset that there is nothing which indicates that petitioner waived his right to have an attorney. No express waiver was made, and there is no basis for implying one in view of the fact that petitioner informed the

mitted a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." Section 987 provides: "If the defendant appears for arraignment without counsel, he must be informed by

the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

court, when his case was called for trial, that he wished to obtain counsel.

As we have seen, the record shows without dispute that petitioner informed the trial court that he had been "confined to bed for the last three weeks" and that he would like a chance to get witnesses and counsel. While petitioner did not directly state that the illness or disability which confined him to bed prevented him from obtaining counsel, it is obvious that this is the meaning of his statement to the court. It must be remembered, in this connection, that petitioner did not then have the aid of an attorney to prepare a more specific or more detailed explanation for his appearance without counsel, and it would of course be unreasonable to apply to him the same standards of skill expected of an attorney. The declaration of the trial court to petitioner that "You have had plenty of time" to obtain counsel is not justified by the record and does not meet petitioner's explanation that he was confined to bed during the three weeks immediately preceding the trial.

[5,6] Since petitioner was not represented by an attorney when his case was called for trial, the court should have been particularly careful to safeguard his rights, and, before rejecting his uncontradicted explanation, it should have at least questioned him as to any doubts it might have had with respect to the truth or validity of his statement. Instead, however, the court summarily denied his request for a continuance and ordered trial to commence at once. Under all the circumstances this procedure amounted to a denial of petitioner's constitutional right to counsel. It follows that his conviction cannot be permitted to stand and that he should be remanded to custody for further proceedings in the municipal court in conformity with his right to counsel. In *re McCoy*, 32 Cal.2d 73, 76-77, 194 P.2d 531; see *In re Egan*, 24 Cal.2d 323, 337, 149 P.2d 693; cf. *People v. Lanigan*, 22 Cal.2d 569, 572-577, 140 P.2d 24, 148 A.L.R. 176. If he is again sentenced to imprisonment, he will be entitled to have the time served on the invalid judgment credited upon the new confinement. Pen.Code, § 2900.1; In *re Roberts*, 40 Cal.2d 745, 748, 255 P.2d 782; In *re Levi*, 39 Cal.2d 41, 47, 244 P.2d 403.

The judgment of conviction being invalid, petitioner is remanded to the custody of the Chief of Police of the City of Los Angeles pending further proceedings in the municipal court.

EDMONDS, TRAYNOR, SCHAUER,
and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion and generally in the reasoning upon which it is based, as it appears to be in full accord with the views expressed by me in my dissenting opinion in *People v. Dorman*, 28 Cal.2d 846, 855, 172 P.2d 686, except that in the *Dorman* case we were reviewing the case on its merits on an appeal from the judgment, and here the review is limited to the issues which may be raised on habeas corpus.

It is apparent to me that the principal error committed by the trial court in the case at bar was in denying a continuance to enable the defendant to obtain counsel and prepare his defense, as it is clear that even if the court had appointed counsel for him and he had been forced to trial on the day the case was called, he would not have been accorded the type of trial guaranteed by both the federal and state constitutions and the law of this state. Such was the situation in the *Dorman* case which a majority of this Court sanctioned in affirming the judgment there. It is somewhat refreshing to me to see the Court now reverse the position taken by it in the *Dorman* case.

SHENK, Justice.

I concur. The petitioner has shown a denial of his constitutional right to counsel. The cases involving this question usually turn on the application of their own facts. The facts in *People v. Dorman*, 28 Cal.2d 846, 172 P.2d 686, 690, bear no resemblance to the present case. There the appellant was represented by counsel during all the forty-one day period from arraignment to trial. During the trial he "was ably and energetically represented by counsel of his choice" and "The conduct of the defense was full and fair", majority opinion, 28

Cal.2d at page 852, 172 P.2d at page 690. It was said in the dissenting opinion, 28 Cal.2d at page 859, 172 P.2d at page 694, that defense counsel "presented a vigorous defense". The question in that case was whether the trial judge had abused his discretion in not granting a further continuance. It was held that on the facts presented he had not.



41 Cal.2d 519

**MYRICK v. SUPERIOR COURT OF STATE,
IN AND FOR SANTA CLARA
COUNTY.**

S. F. 18877.

Supreme Court of California, in Bank.
Sept. 25, 1953.

Petition for writ of prohibition to restrain trial court from further proceeding in personal injury action in which petitioner was a defendant, on ground that the court did not acquire in personam jurisdiction over him as result of service of process on him outside the state. The Supreme Court, Spence, J., held that since petitioner at time of accident out of which action arose and at time of commencement of the action was a resident of the state, the summons served pursuant to statute relating to jurisdiction in personam over absent defendant by service outside the state was sufficient to vest jurisdiction in the trial court, though at time of making up order for publication of summons and at time that personal service was effected on petitioner outside the state he was no longer a resident of the state.

Alternative writ discharged and petition for peremptory writ denied.

Prior opinion, 256 P.2d 348.

Automobiles ◊235

Where at time of automobile accident and at time of commencement of action for injuries sustained therein, defendant was resident of the state, summons issued under statute relating to acquisition of jurisdiction in personam over absent defendant by service outside the state vested jurisdiction in the trial court, though at time

of making of order for publication of summons and at time personal service was effected outside the state, defendant was no longer a resident of the state. Code Civ. Proc. §§ 412, 413, 417.

Sidney L. Weinstock, Roger Anderson and Harold J. Chase, San Francisco, for petitioner.

No appearance for respondent.

James F. Boccardo, San Jose, and Edward J. Niland, Santa Clara, for Real Party in Interest.

SPENCE, Justice.

Petitioner seeks a writ of prohibition to restrain the Superior Court of Santa Clara County from taking any further proceedings in a personal injury action in which he is named defendant. He claims that the court did not acquire *in personam* jurisdiction over him as the result of the service of process on him without the state. There is no merit to his position.

On July 19, 1951, petitioner, a resident of California, was involved in an automobile accident. On November 28, 1951, while petitioner was still a resident of this state, the complaint for damages was filed in the respondent court and summons was issued. Some time between the latter date and February 5, 1952, petitioner was arrested at the request of the New York authorities and removed to that state. Diligent but unsuccessful efforts had been made to serve petitioner with process before he left this state. Petitioner alleges that on February 5, 1952, he became a resident of New York and ever since such date has continued to reside there. On April 8, 1952, an affidavit was filed by the plaintiff in the damage action, setting forth the above circumstances affecting the petitioner's change of residence from California to New York. The court thereupon made its order directing the service of summons on petitioner by publication and also by personal service in New York. On April 18, 1952, petitioner was personally served with summons and complaint in New York. On November 10, 1952, petitioner appeared specially in the action and moved to quash the service of

summons on the ground that the court had not acquired jurisdiction over him or over the subject matter. The motion was denied on January 6, 1953, and this proceeding was then instituted.

This case presents the same problem as that considered in the recent case of *Allen v. Superior Court*, Cal.Sup., 259 P.2d 905, 906. The statutes involved are sections 412, 413 and 417 of the Code of Civil Procedure. As in the *Allen* case, "both at the time that the accident occurred and at the time of the commencement of the action, petitioner was a resident of [this] state"; and "both at the time of the making of the order for publication of summons and at the time that personal service was effected on petitioner" without the state, he was no longer a resident of this state.

On authority of that case and for the reasons there stated, petitioner cannot prevail in his challenge of the respondent court's acquisition of *in personam* jurisdiction over him.

The alternative writ is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.



41 Cal.2d 460

**WOTTON et al. v. BUSH, State Oil
and Gas Supervisor, et al.**
L. A. 22287.

Supreme Court of California, in Bank,
Sept. 18, 1953.

Action for determination that plaintiffs' real property was located within certain oil field and for that reason could be drilled and placed in production without compliance with spacing provision of Public Resources Code. The Superior Court, Los Angeles County, Jesse J. Frampton, J., entered judgment finding that plaintiffs' property was not within such oil field, and that plaintiffs must comply with spacing provisions, and

plaintiffs appealed. The Supreme Court, Shenk, J., held that spacing provision of Public Resources Code was not void for uncertainty or as unauthorized delegation of legislative power where division of oil and gas had given consistent interpretation to such statute since its enactment, and in view of such consistent interpretation statutory provision had been reenacted by legislature.

Affirmed.

Prior opinion 251 P.2d 376.

1. Constitutional Law ⇨258

Statute which either forbids or requires doing of act in terms so vague that men of common intelligence must necessarily guess at statute's meaning and differ as to its application denies due process.

2. Statutes ⇨219

Contemporaneous administrative construction of enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless clearly erroneous or unauthorized.

3. Statutes ⇨219

Administrative construction given to oil well spacing statute since its enactment would be considered as aid in determining meaning of word "field." Public Resources Code, § 3605.

4. Constitutional Law ⇨48

One attacking statute has burden of proving that its application to circumstances of particular case is unwarranted.

5. Statutes ⇨184

Objective sought to be achieved by statute as well as evil to be prevented is of prime consideration in interpretation of statute.

6. Mines and Minerals ⇨92.2

State has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of migratory gas and oil underlying their lands.

7. Constitutional Law ⇨62

Indefiniteness in statutory terminology may be tested as an invalid delegation of power as well as denial of due process.

8. Administrative Law and Procedure

⌚203, 209

Delegation of absolute legislative authority to administrative body is not proper, but if delegating statute establishes ascertainable standard to guide administrative agents, no objection can properly be made to such delegation.

9. Statutes ⌚223.5(1)

Settled administrative interpretation at time of re-enactment of statute is entitled to consideration as legislative approval of such interpretation, and as having established limit within which administrative action was intended to be confined.

10. Administrative Law and Procedure

⌚208

Constitutional Law ⌚62

Legislature may, after declaring policy and fixing primary standard, confer upon executive or administrative officer power to prescribe administrative rules and regulations to promote purposes of legislative enactment, and to carry it into effect.

11. Constitutional Law ⌚62**Mines and Minerals** ⌚92.4**Statutes** ⌚47

Public Resources Code section requiring spacing of oil wells placed in production after certain date was not void for uncertainty or as unauthorized delegation of legislative power where division of oil and gas had given consistent interpretation to statute since enactment, and Legislature had in view of such consistent interpretation re-enacted statute. Public Resources Code, § 3605.

Dolley, Knight, Woods & Hightower, Los Angeles, and James M. Hall, Redondo Beach, for appellants.

William Kinley, George E. Wise and Simpson & Wise, Long Beach, as amici curiae on behalf of appellants.

Edmund G. Brown, Atty. Gen., and John F. Hassler, Deputy Atty. Gen., for respondents.

Pillsbury, Madison & Sutro, Turner H. McBaine and James L. Wanvig, San Francisco, as amici curiae on behalf of respondents.

SHENK, Justice.

This is an appeal from a judgment for the defendants in an action seeking declaratory relief. A determination is sought to establish that the plaintiffs' real property is located within the Rosecrans Oil Field in Los Angeles County and for that reason may be drilled and placed in production without first complying with the spacing provisions of Chapter 3, Division 3 of the Public Resources Code (Spacing of Wells and Community Leases). Section 3605 of that chapter provides: "The provisions of this chapter do not apply to any field producing oil or gas on August 14, 1931." The Rosecrans field was producing oil or gas on the designated date. However, the trial court found that the plaintiffs' property was not in the Rosecrans Oil Field but lay within a new field called the Howard Townsite Field; and that the plaintiffs must comply with the spacing provisions.

At the trial there was substantial evidence to the effect that the Rosecrans and the Howard Townsite areas were different fields; that they were separated by an economically unproductive area; that they were separated geologically by a fault; that there was no drainage across or over the fault; that the regulation of production in one area would have no effect on production in the other; and that since the first discovery well in the Howard Townsite area in 1947 it had been the administrative practice of the Division of Oil and Gas with regard to approximately twenty wells since drilled therein to treat that area as a new oil field. There was evidence to the effect that the two productive areas were merely parts of the overall Rosecrans Oil Field. In the face of this conflict the trial court found that the plaintiffs' property, comprising less than an acre in area, lay outside of the Rosecrans field and in a new field of production.

It is argued on appeal that the provision of Section 3605, set forth above, is unconstitutional for two reasons, both of which relate to the meaning of the term "field" as used in that section. It is argued first that the section is void for uncertainty, and secondly that by leaving to an administrative body (the Division of Oil and Gas)

the determination of what constitutes a "field producing oil or gas" there has been an improper delegation of legislative power.

The Oil Well Spacing Act, as it is known, was enacted in its present form in 1947, Stats.1947, p. 3200, Public Resources Code, §§ 3600 to 3608, incl. However, Sections 3600 through 3605 have existed in substantially the same language since 1931, Stats. 1931, p. 1277. In general the act prohibits the drilling for or production of oil or gas on a parcel of land smaller than a certain minimal size (substantially one acre) in fields which were not producing on August 14, 1931. By the provisions of Section 3608 such a parcel of land "shall, for oil and gas development purposes and to prevent waste and to protect the oil and gas rights of landowners, be deemed included" in a community lease with surrounding land to constitute a leasehold large enough to be drilled upon. Provision is made for the declaration of such a leasehold and pro rata shares in the community production. In *Hunter v. Justice's Court*, 1950, 36 Cal.2d 315, 223 P.2d 465, this court upheld the constitutionality of those portions of the act relating to the production of oil and gas in areas not producing in 1931 but did not find it necessary to consider the constitutional questions raised in the present case.

[1] It is established that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; see also *Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589. In the present case the legislature has not defined the phrase "field producing oil or gas." The dictionary defines a "field" as a "natural area or section of land containing or yielding some particular, esp. mineral, resource; as * * * an oil field." Webster's New International Dictionary, 2nd Ed., 1935, p. 941. The legislatures in other states have undertaken to define the terms used in connection with oil legislation. For example, the following is an

excerpt from the General Laws of Mississippi, 1948, Chapter 256, Section 4: "* * (e) 'Pool' shall mean an underground reservoir containing a common accumulation of oil or gas or both. Each zone of a general structure which is completely separated from any other zone in the structure is included in the term 'pool' as used herein. (f) 'Field' shall mean the general area which is underlaid or appears to be underlaid by at least one pool; and 'field' shall include the underground reservoir or reservoirs containing oil or gas or both. The words 'field' and 'pool' mean the same thing when only one underground reservoir is involved; however, 'field', unlike 'pool', may relate to two or more pools."

In the light of legislative enactments elsewhere, general practices and understanding it is reasonable to conclude that the term "field" has been given a meaning susceptible to proof by evidence of common usage in the industry. In this case an expert witness for the plaintiffs, Dr. Robin Willis, stated that a "layman understands an oil field, as a general rule, to be all of a contiguous area, a general area, from which oil is produced. A technical man would be inclined to amplify that to say all of that area from which oil is, has been, or may in the future be produced from a single major causal geological feature." Mr. John R. Pemberton, former Oil Umpire for the petroleum industry, stated: "My understanding of an oil field is that it comprises a distinct and isolated structural uplift of the type in which oil will accumulate * * * it * * * may be all split up, broken by faults of all kinds * * *. An oil field, as such, is not entirely, but it is more or less, a geographical term. It refers to an area."

On behalf of the defendants Dr. Luis E. Kemnitzer testified that in his estimation, "the term 'oil field' should be governed by the economics of the situation"; that it should be considered as an area in which continuous and contiguous production is obtained, and "that the limits of this oil field are those established by the dry holes or uneconomic production." John H. Wents, Jr., stated: "I define an oil field as simply the surface area used

in exploitation of an underground pool or pools of oil. An oil field is bounded by an uneconomic production or dry holes." Mr. E. H. Musser, Deputy State Oil and Gas Supervisor and one of the named defendants, stated that for "the purpose of our work, however, we have taken an oil field to mean, in general, a producing area * * *."

The plaintiffs contend that the concepts expressed by the witnesses show a lack of uniformity and are irreconcilable. But the record does not indicate that the definitions are necessarily inconsistent. Defendant Musser's "producing area" is not inconsistent with the areas defined with reference to economic limits by the defendants' other experts. Nor is it materially different from the geographical "area" of the plaintiffs' witness Mr. Pemberton, or the layman's concept of "a contiguous area, a general area, from which oil is produced" according to the plaintiffs' witness, Dr. Willis. Nor is there anything in the record to show that the "distinct and isolated structural uplift" described by Mr. Pemberton is inconsistent with the "economic limits" depended upon by the defendants. Dr. Willis stated that "a major causal geological feature", as he described a field, could relate to a productive area which was not always defined by economic limits. He referred to a situation where two distinct fields overlapped at different levels and productivity would therefore be continuous between the fields.

In general the disagreement in terminology between the parties was directed to the specific problem before the trial court—the determination of whether the plaintiffs' property lay within the Rosecrans field. The parties agreed that this property was separated from the main Rosecrans field by an area of uneconomic production.

[2,3] Under the circumstances of this case it is proper that the administrative construction given to Section 3605 since its enactment in 1931 be considered as an aid in determining the meaning of the statute. In *Richfield Oil Corporation v. Crawford*, 39 Cal.2d 729, 249 P.2d 600, 604, the interpretation of other terms in the Oil Well Spacing Act was before the court.

It was held that "The contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." An administrative officer of the Division of Oil and Gas testified that the administration of the act had at first been difficult because of the absence of a precise legislative definition of an "oil field"; that later the matter of drainage into or out of a region had been given prime consideration in settling upon a criterion; that a field had come to be considered as that expanded area from the region of initial production to the limits of productivity in all lateral directions; and that within a given field there was no structural connection or drainage to or from other fields. He testified that in general this had been the consistent interpretation of the Division and others in the industry, and that by its application the Howard Townsite area had been determined to be a new field long before the plaintiffs had expressed a desire to drill in that area.

[4] The plaintiffs contend that the Division of Oil and Gas has not consistently applied its asserted interpretation with respect to the present inquiry. They rely upon certain maps, publications and letters as evidence that the Division has not consistently considered the Howard Townsite area to be outside the Rosecrans field. Mr. Musser testified on several occasions that the publications were compiled for the convenience of the Division in its filing and statistical requirements (and some of the publications so indicate), and did not purport to define the limits of the various fields depicted thereon; that the maps showed other fields expanded much beyond their recognized limits for the same reason; that approximately twenty other wells were drilled in the Howard Townsite area in conformity with the spacing regulations, and that the Division's maps issued since the commencement of the present action but on which the work had begun prior to that time showed the Howard Townsite area as a separate field.

This question was resolved by the trial court in favor of the defendants by the finding that the plaintiffs' property was not in the Rosecrans field. Other contentions to the effect that the Division has not consistently applied its interpretation in factual situations similar to that of the present case are not supported by the record. It may not be said that as a matter of law there has not been a consistent administrative interpretation.¹ The burden, of course, is on those attacking the statute to show that its application to the circumstances of the particular case is unwarranted.

[5,6] The interpretation given Section 3605 by the Division of Oil and Gas is aided by the rule "that the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in its interpretation." *Rock Creek Water District v. County of Calaveras*, 29 Cal.2d 7, 9, 172 P.2d 863, 865; see also *Richfield Oil Corporation v. Crawford*, supra, 39 Cal.2d 729, 738, 249 P.2d 600. Among the purposes of the Oil Well Spacing Act is to "prevent waste and to protect the oil and gas rights of landowners", § 3608, Public Resources Code. In *Hunter v. Justice's Court*, supra, 36 Cal.2d 315, at pages 317 and 318, 223 P.2d 465, at page 467, it was said that Section 3608 was adopted to provide a means by which the small landowner might "prevent the drainage of the underlying oil basin by wells on adjacent land * * *. It is the settled rule that 'a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land * * *'. *Hunter Co. v. McHugh*, 320 U.S. 222, 227, 64 S.Ct. 19, 21, 88 L.Ed. 5 * * *." Where the object of the statute is to secure equitable apportionment of migratory

oil and gas it is clear that measures taken in a particular region beyond or into which there can be no migration will have no effect whatsoever on an adjacent similar region. The exception of Section 3605 by which the spacing regulations are not applied in a region producing on August 14, 1931, should apply uniformly to the whole of that region into or from which there is no migration or drainage if the objective of the statute is to be accomplished. Similarly, in a region where wells are subject to spacing regulations the limits of that region should extend to the limits of migration or drainage, if the objective of the act is to be achieved. Such regions are consistent with the asserted administrative interpretation of the term "field."

[7,8] Indefiniteness in statutory terminology may be tested as an invalid delegation of power as well as a denial of due process. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516. The delegation of an absolute legislative discretion to an administrative body is not proper, but if the delegating statute establishes an ascertainable standard to guide the administrative agents no objection can properly be made to it.

[9] In the present case the question of whether sufficient criteria have been provided by the legislature to guide the Division of Oil and Gas in applying or withholding spacing regulations with regard to a particular well is interrelated with the question of the vagueness of the expression "any field producing oil or gas on August 14, 1931." As has been seen, the statute seeks to achieve objectives which can only be gained by consistently applying an interpretation to it which an administrative body could and did settle upon. It should be noted that sixteen years after the Oil Well Spacing Act had been enacted and

1. The record reveals that the Division of Oil and Gas has been confronted with varying situations, depending largely on differences in geological formation. The Division's practice must necessarily vary as these different formations are encountered. In one case, the Montebello Oil Field in the Los Angeles Basin was producing on August 14, 1931, and new wells

drilled in that field were not made subject to the spacing regulations. Thereafter a field recognized by experts as a new field was discovered underlying a small portion of the old field but 2500' below it. The two fields were not separated by an area of uneconomic production. The Division did not apply the spacing regulations in the new field.

during which time it had been applied, it was added to and re-enacted with no change in Section 3605. Stats.1947, p. 3200. Settled administrative interpretation at the time of such re-enactment is entitled to consideration as legislative approval of that interpretation, and as having established a limit within which the administrative action was intended to be confined. *Richfield Oil Corporation v. Crawford*, supra, 39 Cal.2d 729, 736, 249 P.2d 600; *Mudd v. McColgan*, 30 Cal.2d 463, 471, 183 P.2d 10; *Nelson v. Dean*, 27 Cal.2d 873, 882, 168 P.2d 16, 168 A.L.R. 467.

[10] The administration of oil and gas conservation statutes is a difficult problem because conditions are continually changing. It may well be that the Legislature did not desire to lay down minutely defined standards in the interest of providing for flexibility. The Legislature cannot and need not anticipate every situation that may arise. See *Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 407-408, 48 S.Ct. 348, 72 L.Ed. 624. In *First Industrial Loan Co. of California v. Daugherty*, 1945, 26 Cal.2d 545, 549, 159 P.2d 921, 923, the court stated that "The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect * * *."

[11] Bearing in mind the overall objective of the statute, the administrative practice and the evidence in this case it must be concluded that the expression "field producing oil or gas" has an understandable meaning in the industry and that it is not void for uncertainty. It must also be concluded that the Division of Oil and Gas has applied the phrase to mean a subterranean region into which or from which there is no lateral drainage; that the surface of such a region is ascertain-

able by limits of uneconomic production, and that such a construction is reasonable and proper. At the time of the re-enactment of the statute in 1947 there had been a consistent application of this administrative construction in similar factual situations for a period of sixteen years. It must be assumed that the Legislature intended this settled construction to establish a standard within which administrative action would continue to be exercised. The delegation of power by the 1947 re-enactment was thus limited by a sufficient criteria to avoid any implication that it was an unlawful delegation of legislative discretion.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, Judges, concur.



41 Cal.2d 546

BOARD OF EDUCATION OF CITY OF
LOS ANGELES v. SWAN.

L. A. 22343.

Supreme Court of California, in Bank.

Oct. 2, 1953.

Dismissal proceedings, wherein Superior Court, Los Angeles County, Otto J. Emme, J., entered judgment that plaintiff board of education could dismiss defendant from her position as a teacher, and defendant appealed. The Supreme Court, Spence, J., held that findings as to unprofessional conduct, unfitness for service, and violation of or refusal to obey school laws and reasonable regulations of state and city boards of education warranted dismissal of teacher.

Judgment affirmed.

Schauer, J., dissented in part.

Prior opinion, App., 250 P.2d 306.

I. Schools and School Districts ☞ 141(4)

A particular act or omission of teacher may constitute grounds for dismissal for more than one reason, and hence in formulating charges against permanent teach-

er, charging the same act as constituting several causes for dismissal under statute was not error. Education Code, § 13521 et seq.

2. Schools and School Districts ⇨141(4)

Refusal of teacher to accept teaching assignments which school authorities had power to make constitutes a violation of school laws as ground for dismissal. Education Code, §§ 13521 et seq., 13529.

3. Schools and School Districts ⇨141(4)

Wilful refusal of teacher to obey reasonable rules and regulations of employing board of education constitutes insubordination as ground for dismissal. Education Code, §§ 13521 et seq., 13529.

4. Schools and School Districts ⇨141(4)

Insubordination and failure to recognize constituted authority may render teacher unfit for service in school even though her qualifications are otherwise sufficient. Education Code, §§ 13521 et seq., 13529.

5. Schools and School Districts ⇨141(5)

Findings that permanent teacher and school principal made derogatory statements and used undignified language with reference to school administrative officers, continuously disregarded rules requiring attendance at meetings called to assist principals in their work, patently suggested to teachers violation of rule requiring that classroom keys be left in principal's office and refused to accept two teaching assignments warranted her dismissal. Education Code, §§ 13521 et seq., 13529, 13531, 13552.

6. Schools and School Districts ⇨141(4) ⁷

The phrase "unprofessional conduct" as used in Education Code as ground for dismissal of teacher is to be construed according to its common and approved usage having regard for the context in which it is used. Education Code, §§ 10, 13521, 13529.

7. Statutes ⇨47

Failure to define the term "unprofessional conduct" does not render statute authorizing dismissal of teacher on such ground void for uncertainty. Education Code, § 13521.

8. Schools and School Districts ⇨141(2)

No one has a natural or inherent right to teach in a public school and the legislature for reasons of public policy may make the right to teach in any particular school subject to a broad discretion in school authorities to dismiss for causes which come within very general designations. Education Code, §§ 13521 et seq., 13529.

9. Schools and School Districts ⇨141(5)

Facts found in dismissal proceeding supported determination of trial court that permanent teacher and principal had been guilty of unprofessional conduct as ground for dismissal, though there was no evidence as to what constituted professional or unprofessional conduct. Education Code, §§ 10, 13521, 13529.

10. Schools and School Districts ⇨141(5)

In proceeding for dismissal of permanent teacher and principal, defenses that instructions to report for teaching assignments were not made in good faith, that dismissal was not for causes specified in charges but because of testimony before grand jury and statements to the press and other groups, criticizing city board of education, constituted attacks on the motives of board rather than excuse for, explanation of, or denial of acts or omissions charged, and were therefore properly stricken. Education Code, §§ 13521, 13531.

11. Schools and School Districts ⇨141(5)

City board of education had the legal right to institute proceedings for dismissal of permanent teacher and principal and hence inquiry into extraneous facts to determine possible improper motives of board in instituting such proceedings was not justified, since where there is legal right to do act, motive which prompted act is immaterial. Education Code, §§ 13521, 13529.

12. Schools and School Districts

⇨133.10, 141(2)

School principals do not secure tenure in such capacity and governing board may cancel their contracts as principals at any time, subject to possible judgment for damages in an action at law in event board

fails to justify dismissal of principal from such position. Education Code, §§ 13088, 13089.

13. Schools and School Districts ⇨141(2, 4)

City board of education acted within its authority in demoting employee to position of teacher notwithstanding years of service as a principal, and refusal of such former principal to accept teaching assignments constituted insubordination for which she was subject to dismissal. Education Code, §§ 13088, 13089, 13521, 13529.

14. Officers ⇨110

One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by authorized governmental body or officer to the end that proper discipline may be maintained and that activities among employees may not be allowed to disrupt or impair the public service, and in discharging duty to exercise such control over public employees in the public interest, a wide discretion is allowed, which will not be disturbed until the point of illegality is reached.

15. Constitutional Law ⇨90, 274

City board of education had the right to require obedience to rules reasonably promulgated by it as a condition to holding office of teacher, and dismissal of teacher for disobedience of such rules did not infringe upon constitutional guarantee of freedom of speech on theory that thereby teacher was denied right to criticize board upon pain of losing her position. Education Code, §§ 13521, 13529; Const. art. 1, § 9; U.S.C.A. Const. Amends. 1, 14.

16. Schools and School Districts ⇨141(5)

Trial court's determination upon conflicting evidence that charges were sufficient to justify dismissal of permanent teacher was conclusive on appeal. Education Code, §§ 13521, 13529, 13552.

17. Schools and School Districts ⇨141(5)

Dismissing some of the charges previously made against teacher on motion of board of education at beginning of trial of dismissal proceeding was not error prejudicial to teacher. Education Code, § 13529.

18. Schools and School Districts ⇨141(5)

Judgment determining that board of education could dismiss teacher was permissive only and was not a matter of direction or compulsion. Education Code, § 13552.

Owen J. Brady, Alexander H. Schullman and Richard L. Rykoff, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Los Angeles, Wm. E. Lamoreaux and Clarence H. Langstaff, Deputy County Counsel, Los Angeles, for respondent.

SPENCE, Justice.

This is an appeal from a judgment permitting plaintiff to dismiss defendant and to terminate her employment as a permanent teacher of the Los Angeles City School District. Defendant urges these principal points as grounds for reversal: (1) insufficiency of the evidence to sustain the findings and judgment permitting her dismissal; and (2) error in the trial court's striking of her special defenses relating to alleged improper motives as the basis for plaintiff's institution of the dismissal proceedings. There is no merit to her position in view of the record and the governing statutory law.

For more than twenty-nine years defendant had been employed by the school district as a teacher and principal, and during the period here involved she was serving in the latter capacity for the Wilshire Crest School in Los Angeles. On April 26, 1951, charges were formulated by plaintiff alleging that causes existed for her dismissal. Written notice of plaintiff's intention to dismiss defendant, together with copy of the charges, was served upon her. Defendant thereupon demanded a hearing and plaintiff, as authorized by statute, elected to file this action asking the court to inquire into the charges, determine whether or not they were true, and if so, whether they constituted sufficient grounds for her dismissal. Ed.Code, sec. 13529. The court found the following charges to be true:

(1) About March 13, 1951, before a regularly scheduled meeting of the Wil-

shire Crest Parent Teachers Association, defendant made derogatory statements concerning the Superintendent of Schools and criticized the Board of Education for bringing him to Los Angeles.

(2) At the same meeting defendant stated that she had been called before the Los Angeles City Board of Education and had "spit in their faces."

(3) Defendant failed and refused to report for teaching assignments on April 9, 1951, and April 23, 1951, when instructed to do so by the Superintendent of Schools acting under order of the Board of Education.

(4) During the school year 1949-1950 defendant requested a teacher in her school to join a teachers' union in violation of the school district's rule.

(5) Defendant caused to be paid to the Wilshire Crest Parent Teachers Association the total proceeds received from a carnival jointly presented by it and the student body under a permit providing for an equal division of the proceeds between the two groups; and contrary to established rules and policies, she accepted from the Parent Teachers Association nine phonographs purchased for the school from the carnival proceeds without obtaining the approval of the student body finance section of plaintiff's administrative office.

(6) Defendant failed to attend meetings called by the Superintendent of Schools and his assistants to aid school principals in their work, although such attendance was required under the school district's rules.

(7) During the school year 1950-1951 defendant dismissed each day approximately fifty children of the first and second grades a few minutes before two o'clock in the afternoon, although such practice was expressly disapproved by the Assistant Superintendent of Schools and contrary to the stated closing hour of 2:00 p. m. as provided in the prescribed rules.

(8) In February, 1950, defendant issued a written bulletin to the teachers in her school suggesting that they have duplicate classroom keys made to take home with them, in violation of the rule providing that classroom keys should be left in the principal's office.

(9) At the above-mentioned Parent Teachers Association meeting of March 13, 1951, defendant called the Superintendent of Schools and other school administrators "henchmen" and the Board of Education Office "The Little Kremlin"; and immediately upon adjournment of the Parent Teachers Association meeting defendant permitted the persons present to assemble in a citizens meeting in her school without the necessary permit as required by plaintiff's rules regulating the holding of public meetings in school buildings.

From such findings the court concluded that there was cause for defendant's dismissal on these grounds: (1) unprofessional conduct; (2) evident unfitness for service; and (3) persistent violation of or refusal to obey the school laws of the state and reasonable regulations prescribed for the government of the public schools by the State Board of Education and by the Board of Education of the City of Los Angeles. Ed.Code, sec. 13521. Accordingly, judgment was entered authorizing defendant's dismissal. Ed.Code, sec. 13552.

[1] As a preliminary matter, defendant contends that it was error to include the same charge under more than one cause for dismissal. For example, plaintiff included the charge of defendant's continued refusal to report for a teaching assignment under each of the three above causes for dismissal. Considering this point here despite defendant's failure to make it a ground of demurrer to the complaint, Ed. Code, sec. 13531, there appears to be nothing in the relevant code provisions which would prohibit such practice in formulating the accusatory pleading. Ed.Code, sec. 13521 et seq. Manifestly, a particular act or omission of a teacher may constitute unprofessional conduct, evident unfitness for service, and a persistent violation of or refusal to obey prescribed rules and regulations. Defendant's citation of *Fresno City High School District v. De Caristo*, 33 Cal.App.2d 666, 92 P.2d 668, does not strengthen her position. There it was merely said that each of the causes for removal stated in the code refers to "acts or omissions not necessarily included in the others." 33 Cal.App.2d at page 672, 92

P.2d at page 671. That is not a statement that the acts or omissions charged may not be included in one or more causes for removal.

No useful purpose would be served in detailing the testimony in the record inasmuch as defendant has conceded that "there was certain evidence going to substantiate the truth of the respective charges against her." Briefly, it need only be said that there indisputably appears to have been a long drawn-out course of conduct on the part of defendant which produced serious friction with plaintiff as the result of her insubordination, her refusal to conform to the instructions and requirements of her superiors, and her continued violation of the rules prescribed by the school district. As principal considerations, she made derogatory statements and used undignified language with reference to school administrative officers and in describing her attitude to members of plaintiff board, she continuously disregarded rules requiring her attendance at meetings called to assist principals in their work, she patently suggested to the teachers in her school violation of the rule providing that keys to classrooms be left in the office of the principal, and she refused to accept two teaching assignments. Nevertheless, defendant maintains that giving "the fullest credibility" to these facts, they are not sufficient cause for her dismissal.

[2-5] The refusal of a teacher to accept an assignment which the school authorities have the power to make constitutes a violation of school laws as ground for dismissal. 47 Am.Jur. sec. 139, p. 396; Appeal of Ganaposki, 1938, 332 Pa. 550, 2 A.2d 742, 744-745, 119 A.L.R. 815; Commonwealth ex rel. Wesenberg v. School Dist. of City of Bethlehem, 1942, 148 Pa. Super. 250, 24 A.2d 673, 676; Consolidated School Dist. No. 4 Bryan County v. Millis, Okl.Sup., 1943, 139 P.2d 183, 185; Hamberlin v. Tangipahoa Parish School Board, 1946, 210 La. 483, 27 So.2d 307, 309. The wilful refusal of a teacher to obey the reasonable rules and regulations of the employing board of education is insubordination. Harrison v. State Board of Education, 1946, 134 N.J.L. 502, 48 A.2d 579,

580-581; State ex rel. Steele v. Board of Education of Fairfield, 1949, 252 Ala. 254, 40 So.2d 689, 695. A teacher, and more particularly a principal, in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under her care and protection. Voorhees, The Law of Public Schools, sec. 62, p. 136. In this connection the following language used in Johnson v. Taft School District, 19 Cal.App.2d 405, at page 408, 65 P.2d 912, at page 913, is pertinent: "A board of education is intrusted with the conduct of the schools under its jurisdiction, their standards of education, and the moral, mental, and physical welfare of the pupils during school hours. An important part of the education of any child is the instilling of a proper respect for authority and obedience to necessary discipline. Lessons are learned from example as well as from precept. The example of a teacher who is continually insubordinate and who refuses to recognize constituted authority may seriously affect the discipline in a school, impair its efficiency, and teach children lessons they should not learn. Such conduct may unfit a teacher for service in a school even though her other qualifications may be sufficient. 'Book learning' is only a phase of the important lessons a child should learn in a school." Within these principles, it cannot be said that the charges found to be true do not warrant defendant's dismissal. See Board of Education v. Jewett, 21 Cal.App.2d 64, 72, 68 P.2d 404.

Defendant argues that the court erred in concluding that she was guilty of unprofessional conduct as a ground for dismissal "where there [was] no evidence introduced as to what constitutes professional or unprofessional conduct." In support of her position defendant maintains that the decided cases furnish no basis for a conclusion of unprofessional conduct here; that the cases where a teacher has been held guilty of unprofessional conduct involved acts of a teacher in the presence of his pupils, Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783; Alexander v. Manton Joint Union School Dist., 82 Cal.

App. 330, 255 P. 516; *Gaderer v. Grossmont Union High School Dist.*, 124 Cal. App. 686, 13 P.2d 401; and *Board of Education v. Jewett*, supra, 21 Cal.App.2d 64, 68 P.2d 404; that what constitutes unprofessional conduct is not a matter of common knowledge; and that the matter is not one subject to judicial notice by the court. There is no merit to defendant's position under the record and settled legal principles.

[6] The phrase "unprofessional conduct," as used in the Education Code, is to be construed according to its common and approved usage, having regard for the context in which the Legislature used it. Ed. Code, sec. 10; 23 Cal.Jur. sec. 122, p. 745. The word "unprofessional" is a relative expression without technical meaning or arbitrary connotation. "Unprofessional conduct" is defined in 66 C.J., p. 55, as "that which violates the rules or ethical code of a profession or such conduct which is unbecoming a member of a profession in good standing." Thus it has been held that the violation of a teacher's oath as prescribed by the school code justified revocation of his credentials and constituted "unprofessional conduct" within the meaning of the statutory provisions governing dismissals. *Board of Education v. Jewett*, supra, 21 Cal.App.2d 64, 70, 68 P.2d 404. Conduct which produced serious friction in the school and showed the teacher's insubordination and refusal to conform to the instructions and requirements of her superiors was held "unprofessional conduct." *Johnson v. Taft School Dist.*, supra, 19 Cal.App.2d 405, 407, 65 P.2d 912. The taking of a leave of absence by a teacher without the consent of the school board in violation of its rule was adjudged "unprofessional conduct." *Evard v. Board of Education*, 64 Cal.App.2d 745, 751, 149 P.2d 413.

[7-9] In *Goldsmith v. Board of Education*, supra, 66 Cal.App. 157, 225 P. 783, it was held that a teacher advocating before his class the election of a particular candidate for the office of county superintendent of schools was guilty of "unprofessional conduct." The fact that the term "unprofessional conduct" is not defined by statute

authorizing the dismissal of a teacher, Ed. Code, sec. 13521, does not render it void for uncertainty. As was said in the *Goldsmith* case, 66 Cal.App. at page 168, 225 P. at page 787: "* * * the calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment. * * * the teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. How can all of these things be provided for and offenses against them be particularly specified in a single statute?" It was further said, 66 Cal.App. at page 172, 225 P. at page 789: "No one has a natural or inherent right to teach a public school" and the Legislature "for reasons of public policy" may "make the right to teach in any particular school subject to a broad discretion in the school authorities to dismiss for causes which come within very general designations." We therefore conclude that the facts found were ample to support the determination of the trial court that defendant had been guilty of "unprofessional conduct" as the term is generally understood in relation to the "professional proprieties of a teacher's employment". *Goldsmith v. Board of Education*, supra, 66 Cal.App. at page 169, 225 P. at page 788.

Defendant further contends that the court erred in striking out the three special defenses raised in her answer and in refusing to admit evidence material to their establishment. Those defenses were: (1) the instructions to defendant to report for teaching assignments were not made in good faith; (2) her dismissal was not for the causes listed in the charges but because she had testified before the Grand Jury of Los Angeles County concerning plaintiff board, its members and employees, and had given stories covering her testimony to the

press, private groups, and various interested individuals; and (3) her dismissal was part of plaintiff's calculated plan to remove her from her means of livelihood and deprive her of her right of free speech. In this regard defendant insists that the charges filed against her were merely a camouflage or "smoke screen" for plaintiff's real purpose in wishing to "get even" with her because of her public criticism of the board members.

But this is not a case where a claim of error is based upon the failure of a trial court to admit evidence of the motives of a witness for the purpose of impeachment. 27 Cal.Jur. § 96 et seq., p. 122 et seq. Rather defendant claims that despite the truth of the serious charges brought against her as found by the trial court, she should have been permitted to show the alleged motives of the members of the board, regardless of whether any member became a witness on the trial, presumably upon the theory that a showing of the alleged motives would have had the effect of completely exonerating defendant from such charges. Neither reason nor authority sustains defendant's contention.

[10, 11] Defendant's alleged special defenses did not concern matters which would tend to excuse the acts or omissions charged. The plaintiff board had the unquestioned legal right to institute proceedings looking toward defendant's dismissal; and it is well settled that where there is a legal right to do a particular act, the motive which prompted the act is immaterial. *Neuwald v. Brock*, 12 Cal.2d 662, 675-676, 86 P.2d 1047; *Monahan v. Department of Water and Power*, 48 Cal.App.2d 746, 754, 120 P.2d 730. Therefore an inquiry into extraneous facts to determine possible improper motives on the part of plaintiff would not be justified. The case of *Hanley v. Murphy*, 40 Cal.2d 572, 255 P.2d 1, is clearly distinguishable. There the superior officer acted without regard for the prescribed civil service rules, and his alleged bad faith therefore became a material consideration in determining the aggrieved employee's rights.

Likewise defendant unavailingly seeks to file now as additional evidence the minutes

of plaintiff's "secret" meeting held on February 1, 1951. She notes that these minutes were not transcribed and available until October 29, 1951 (almost two months after conclusion of the trial), and that they show that she was at that time threatened with dismissal charges if she did not turn over to plaintiff evidence procured by her in alleged substantiation of her grand jury testimony. She also claims that plaintiff's counsel was guilty of prejudicial misconduct in failing to produce these minutes since they allegedly establish that defendant's dismissal was ordered by plaintiff in bad faith and as a punitive, retaliatory measure. But such matters only go to the motives of plaintiff and are wholly immaterial to the issue of the truth or falsity of plaintiff's charges as ground for defendant's dismissal. In this action plaintiff, in effect, acted as the prosecutor in initiating the charges and filing the complaint, and having proceeded in strict compliance with its authority under the law, its motives were of no consequence. *Neuwald v. Brock*, supra, 12 Cal.2d 662, 675-676, 86 P.2d 1047.

[12, 13] Defendant argues that after her years of service as a principal, she was not obliged to accept, without a hearing, teaching assignments from the Superintendent of Schools acting under plaintiff's order. But so far as defendant's demotion from the position of principal to teacher was concerned, plaintiff acted within its authority. Principals do not secure tenure in that capacity, *Ed.Code*, §§ 13088-13089, and the governing board may cancel their contracts as principals at any time, subject, of course, to a possible judgment for damages in an action at law in the event the board fails to justify the dismissal of the principal from such position. *Griffin v. Los Angeles City High School Dist.*, 53 Cal.App.2d 350, 351, 127 P.2d 939. Having no tenure in her employment as a principal, defendant was indisputably guilty of insubordination in declining to accept the teaching assignments and was subject to dismissal.

[14] Nor can defendant prevail in her claim that affirmance of her dismissal infringes upon the constitutional guarantee of

her freedom of speech, in that she thereby is denied the right to criticize her superiors upon pain of losing her position. U.S.Const. Amends. I and XIV; Cal.Const. Art. I, § 9. One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the authorized governmental body or officer to the end that proper discipline may be maintained, and that activities among the employees may not be allowed to disrupt or impair the public service. *Christal v. Police Commission*, 33 Cal.App.2d 564, 569, 92 P.2d 416; *City of Los Angeles v. Los Angeles Bldg. & Const. Trades Council*, 94 Cal.App.2d 36, 48-49, 210 P.2d 305. Because of this dominant public interest, the exercise of such control over the public employee is not only a right but is a duty, and in the discharge thereof a wide discretion is allowed, which will not be disturbed until the point of illegality is reached. *Hayman v. City of Los Angeles*, 17 Cal.App.2d 674, 679, 62 P.2d 1047.

[15,16] Plaintiff had the right to require obedience to the rules reasonably promulgated by it as a condition to holding the office of teacher. There are few employments for hire, either public or private, in which the employee does not agree to abide by the rules prescribed by the employer, provided such rules are lawful. Here the court has resolved from conflicting evidence the sufficiency of plaintiff's charges against defendant to justify her dismissal, and such determination will not be disturbed. *Fidler v. Board of Trustees*, 112 Cal.App. 296, 312, 296 P. 912.

[17] At the beginning of the trial the court, on motion of plaintiff, dismissed certain of the charges filed against defendant. She claims that she was thereby prejudiced because the dismissed charges "could not be substantiated by even an iota of evidence"

and she was deprived of the opportunity to show that all the specific charges were groundless, serving merely as a "screen of smoke" for the real reason of her dismissal. She argues that according to the prescribed statutory procedure, the trial court must inquire into the truth and sufficiency of the charges set forth in the complaint and previously served upon her as part of the notice to dismiss, rather than proceed with a hearing of a substantial lesser number of charges. Ed.Code, § 13529. There is nothing in the record which would sustain the validity of defendant's objection to being tried on a reduced number of charges. The cited statute does not purport to limit the trial court's exercise of discretion in settling the issues between the parties as a means of expediting the trial procedure. Accordingly, defendant's position cannot be sustained.

[18] The judgment determining that the board may dismiss defendant is not to be deemed a matter of direction or compulsion, but it is permissive only. Ed.Code, § 13552. Therefore the present board may or may not dismiss defendant as it sees fit.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment and generally in the reasoning of the majority opinion but I do not agree that *Hanley v. Murphy* (1953), 40 Cal.2d 572, 582, 255 P.2d 1, "is clearly [or tenably] distinguishable." This case, I think, follows the law whereas *Hanley v. Murphy* does not and should be overruled.

DIETRICH v. DIETRICH.**L. A. 22352.****Supreme Court of California, in Bank.****Sept. 25, 1953.****Rehearing Denied Oct. 22, 1953.**

Action by wife for separate maintenance, wherein husband cross-complained for annulment or divorce. The Superior Court of Los Angeles County, Orlando H. Rhodes, J., entered order allowing wife alimony pendente lite and attorneys' fees and costs, and defendant appealed. The Supreme Court, Schauer, J., held that since defendant had gone through marriage ceremony and lived with wife as her husband for many years with full knowledge of the circumstances under which she had obtained foreign divorce decree dissolving her prior marriage and in reliance on such divorce, he was estopped from attacking validity of divorce decree.

Order affirmed.

Carter, J., dissented in part.

Prior opinion, 251 P.2d 421.

1. Divorce ⇨214(3), 226**Husband and Wife** ⇨295

Evidence of ceremonial marriage followed by assumption of marital relations is ordinarily sufficient proof of fact of marriage to sustain award of temporary alimony, court costs and attorneys' fees, and extended inquiry into close questions as to validity of marriage will not be allowed in such preliminary proceedings.

2. Divorce ⇨200**Husband and Wife** ⇨295

Existence of marriage is a jurisdictional prerequisite to right of court to order support, costs, and counsel fees pendente lite in action for divorce or separate maintenance, and invalidity of marriage may be shown at any time.

3. Husband and Wife ⇨205(6)

Order awarding temporary alimony, court costs and attorneys' fees pending final disposition of matrimonial action, though it implies a finding of the existence of marriage relationship, does not determine such issue nor affect the final judgment.

4. Divorce ⇨213, 225

Even though defendant in action for divorce denies existence of marriage, court may award temporary alimony, costs and attorneys' fees pendente lite, if defendant is

given an opportunity to be heard and the marriage is proved by a preponderance of the evidence.

5. Husband and Wife ⇨205(6)

Whether evidence that ceremonial marriage amounted to no more than a marriage ceremony or, for any conclusive and readily provable reason, was wholly void or had already been annulled or dissolved may be properly excluded in preliminary proceedings on application for temporary alimony, costs and attorneys' fees pending final disposition of matrimonial action depends on the facts of the particular case.

6. Divorce ⇨214(3)**Husband and Wife** ⇨295

Where existence of marriage is denied in action for divorce or separate maintenance, plaintiff, whether husband or wife, has the burden of showing that actual marital relation existed, and alimony will be denied until such fact is proved to the satisfaction of court or admitted. Civ.Code, § 137.

7. Husband and Wife ⇨205(6)

Where actual marital relation has been admitted or shown in matrimonial action and its existence in law is sought to be avoided by some fact set up by husband or wife, alimony will be granted until such fact is shown. Civ.Code, § 137.

8. Husband and Wife ⇨1

The rights and obligations of husband and wife are mutual and reciprocal. Civ. Code, § 137.

9. Divorce ⇨214(3)**Husband and Wife** ⇨295

On application for temporary alimony, the fact of marriage need not be so conclusively established as for purpose of permanent alimony or any other ultimate purpose of action, and if wife makes out a reasonably plain case of existence of marriage, she should be furnished with means of temporary support and of conducting suit until truth or falsity of her allegations can be ascertained.

10. Divorce ⇨214(3), 226**Husband and Wife** ⇨295**Marriage** ⇨62

On application by wife for costs, attorneys' fees and temporary alimony pending

final disposition of her action for separate maintenance and husband's cross-complaint for annulment or divorce, where ceremonial marriage and actual bona fide assumption of marital relations were established, evidence offered by husband to show that marriage was invalid because foreign decree dissolving prior marriage of wife was invalid was properly excluded.

11. Divorce ⚭230

Husband and Wife ⚭295

Where evidence offered by husband in action by wife for separate maintenance to show invalidity of marriage because foreign decree dissolving prior marriage of wife was invalid showed that with full knowledge of circumstances under which divorce decree was obtained and in reliance on such divorce, husband had gone through marriage ceremony and lived with wife as her husband for many years, public policy required recognition of second marriage and husband was estopped from attacking validity of divorce decree, and evidence offered for such purpose in opposition to application by wife for costs, attorneys' fees, and alimony pendente lite was properly excluded.

12. Divorce ⚭214(3), 226

Husband and Wife ⚭295

Marriage ⚭62

Evidence showed ability of husband to pay amount awarded by court for support of wife and minor children pending final disposition of action by wife for separate maintenance and cross-complaint by husband for annulment or divorce.

13. Divorce ⚭209

Husband and Wife ⚭295

A wife is not entitled to temporary alimony if she has independent income sufficient to enable her to support herself.

14. Divorce ⚭214(3)

Husband and Wife ⚭295

Marriage ⚭62

Evidence as to wife's separate income and amount required monthly for support of wife and minor children warranted inference that trial court properly took into account wife's separate income in fixing amount of award for her support pending

final disposition of her action for separate maintenance and husband's cross-complaint for annulment or divorce.

15. Husband and Wife ⚭205(6)

In determining amount to be allowed wife for attorneys' fees in matrimonial action, court should consider nature of litigation, its complexity, nature and extent of contest, amount involved, financial circumstances of the parties, skill required, and professional standing and reputation of husband's attorneys and of those selected by wife.

16. Divorce ⚭223

Husband and Wife ⚭295

Marriage ⚭62

Where litigation, involving action by wife for separate maintenance and cross-complaint by husband for annulment or divorce, was complicated and vigorously contested and involved community property worth, according to wife's questionnaire, in excess of \$2,500,000 and standing and ability of counsel were high, award of \$10,000 to wife on account of attorneys' fees to enable her to prosecute action and defend cross-complaint was not abuse of discretion.

Wright, Wright, Green & Wright, Loyd Wright and Charles A. Loring, Los Angeles, for appellant.

Jennings & Belcher and Frank B. Belcher, Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff Carol Dietrich brought an action for separate maintenance against her alleged husband, Noah Dietrich. Noah answered, admitting a "purported marriage ceremony" but claiming that there was no valid marriage because at the time of the ceremony Carol was the wife of another man; i. e., was not validly divorced from a previous husband. Noah also cross-complained, seeking an annulment, or, in the alternative, a divorce. Carol obtained an order to show cause and, after hearing, the trial court ordered, among other things, that Noah pay \$10,000 on account of her attorneys' fees, \$2,750 monthly for her support pendente lite, and certain property tax-

es and insurance premiums. Noah appeals from those portions of the order. He does not attack an award of \$750 monthly for the support of the three minor children of himself and Carol.

Noah contends that (1) the trial court erred to his prejudice in rejecting offered proof intended to show that his marriage to Carol was invalid because her previous divorce was invalid; (2) if it is assumed that it had jurisdiction to award temporary support, the trial court erred in fixing the amount of such award. We have concluded that these contentions are without merit.

The parties went through a California marriage ceremony on May 23, 1936, one day after the entry in Nevada of a decree which recited that Carol was granted a divorce from Harold Moore. At the hearing on the order to show cause in the present California divorce proceeding Noah made the following offer of proof to show that at the time of the California marriage ceremony Carol was not legally divorced from Moore: Carol accepted Noah's proposal of marriage in September, 1935, while she was still married to Moore. She knew that Noah was a legal resident of Texas and she planned that after she divorced Moore and married Noah she would leave California and make her home in Texas. On April 4, 1936, Carol and Moore were both legal residents of California. On that day she went to Nevada for the sole purpose of simulating a residence and obtaining a divorce. During the period between April 4, 1936, and May 22, 1936, she frequently wrote to Noah; her letters, among other things, referred to her intention to make Texas her permanent home after their marriage, described her stay in Nevada as a "sojourn," referred to the obtaining of a divorce as "the purpose of my trip," and discussed Noah's arrangements for their contemplated honeymoon voyage. During this same period Carol made several overnight visits to Los Angeles, and on one trip remained in Los Angeles for more than twenty-four hours, despite the fact that before she left California for Nevada she had written Noah that "As I understand the Nevada requirements, I couldn't possibly return here for even a day after establishing

my residence there. * * * It wouldn't do to run any risk of later having it declared invalid." In obtaining the Nevada decree Carol used a power of attorney from Moore; Moore was never present in Nevada during the period from April 4 to May 22, 1936; and Carol paid all the expenses of the Nevada action.

Noah also offered to prove that he "learned for the first time that there was some question regarding the legality of the Nevada divorce * * * in November, 1951" (Carol instituted this action November 13, 1951); however, there is no question that Noah knew of the above described circumstances under which Carol obtained the Nevada decree.

The only portion of the offered proof which the trial court admitted in evidence was an exemplified copy of the judgment roll of the Nevada action. This copy shows that Moore, by Nevada counsel, appeared and answered, denying Carol's allegation that she was a bona fide resident of Nevada, and that the Nevada court found that such allegation was true. The trial court in the present proceeding rejected the balance of the offered proof upon three stated grounds: (1) Noah's conduct in connection with Carol's obtaining the Nevada decree estops him from attacking it. (2) Noah cannot attack the Nevada decree because he is not a party to or interested in it. (3) Noah is precluded from attacking the decree by the full faith and credit clause (U.S.Const. art. IV, § 1).

Carol urges that the evidence was properly excluded for the reasons stated by the trial court and also urges that, regardless of the correctness of those stated grounds, once a ceremonial marriage is established then "in any and all events under those circumstances she is entitled to alimony pendente lite."

[1-3] It may be stated as a general rule that ordinarily if a ceremonial marriage is shown, and if the ceremony is followed by the assumption of marital relations, no further proof of the fact of marriage need be made in preliminary proceedings in order to sustain an award of temporary alimony, court costs and attorneys' fees, and an extended inquiry into close questions as to the

validity of the marriage will not be, and need not be, allowed in such preliminary proceedings. Fundamentally, as declared in *Colbert v. Colbert* (1946), 28 Cal.2d 276, 279, 169 P.2d 633, "The existence of the marriage is a jurisdictional prerequisite for the right of the court to order support, costs, and counsel fees pendente lite in an action for divorce or separate maintenance. [Citations.] And the invalidity of the marriage, as is true of any jurisdictional prerequisite, may be shown at any time." And as pointed out in *Carbone v. Superior Court* (1941), 18 Cal.2d 768, 771-772, 117 P.2d 872, 136 A.L.R. 1260, "Even though the defendant in an action for divorce denies the existence of the marriage, the court may nevertheless make the order if defendant is given an opportunity to be heard and the marriage is proved by a preponderance of the evidence. * * * Although such an order implies a finding of the existence of the relationship, the proceeding need not be so complete nor the evidence so extensive as upon the trial of the issues of the case and the order therefore does not determine those issues nor affect the final judgment. [Citations.]"

[4, 5] The above stated general rule does not mean, however, that the mere showing that the words of a marriage ceremony have been said, absolutely and in all events precludes a defendant on an order to show cause from being heard in challenge of the fact of marriage. Absurd results could follow if we accepted Carol's broad contention that in no event, on the hearing of an application for temporary alimony and suit money, can evidence tending to show the invalidity of an admitted ceremonial marriage be received; for example, a spouse could be required to pay temporary alimony even though he or she could show—and offered to show conclusively—that in the very same court the marriage now relied on had been previously annulled at the instance of the other spouse by a judgment which had become final and that such spouse had remarried. To absolutely exclude such evidence sim-

ply because of the fact that the parties had once participated in a ceremony of marriage would deny verity to the substance of the rule, as stated in the *Carbone* case, that "Even though the defendant in an action for divorce denies the existence of the marriage, the court *may nevertheless make the order if defendant is given an opportunity to be heard and the marriage is proved by a preponderance of the evidence.*" (Italics added.) An opportunity "to be heard" means an opportunity to contest. To give full effect to the rule for which Carol contends would mean that the opportunity of an adverse party to be heard would be satisfied and concluded if he or she were permitted to be present when the one seeking temporary alimony produced an authenticated copy of a recorded certificate of marriage of the parties. Since, as stated in the *Carbone* case, *supra* (at page 772 of 18 Cal.2d, at page 874 of 117 P.2d), the adverse party, in response to an application for temporary support in a paternity or divorce action, "must be given an opportunity to be heard and to present his evidence * * * [although] [t]he resulting judgment is temporary in effect," it appears that in any given situation it must depend on the facts of the case whether evidence relating to the fact of marriage, and, in particular, evidence tending to show that a ceremonial marriage in fact amounted to no more than a marriage ceremony (i. e., was a mock marriage or, for any conclusive and readily provable reason was wholly void or had already been annulled or dissolved) may be properly excluded.

[6-9] In *Bancroft v. Bancroft* (1935), 9 Cal.App.2d 464, 468, 50 P.2d 465, the District Court of Appeal quoted with approval from *Brinkley v. Brinkley* (1872), 50 N.Y. 184, 193, as follows: "'And the principle at the bottom is this: Where, marriage in fact being denied, the affirmative is upon the party claiming to be the wife¹ to show that an actual marital relation ever existed, there alimony will be denied until that fact is proven to the satisfaction of the court, or is admitted; for it is upon the

1. In California, since the rights and obligations of husband and wife are mutual and reciprocal (Civ.Code, § 137), the

principles stated apply interchangeably to either husband or wife as the case may be.

existence of that relation alone that the right to alimony depends. Where an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact, there alimony will be granted until that fact is shown; for the relation actually exists upon which the right to alimony depends, and the object of the litigation is to annul that actual relation by showing some other fact, the existence of which is denied. It may be said, too, that for the purposes of an application for temporary alimony there will not be need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action. It is for the interest of society and in aid of public policy that, where the married relation has been in fact assumed * * * and where it is averred by the putative wife and denied by the alleged husband, if she makes a reasonable plain case of its existence, she should be furnished with means of temporary support and of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the case.'” (See also 35 Am.Jur. 226, 227, § 70.)

[10] Applying the above stated principles, which we adopt, to the present case, since it appears that there was a ceremony of marriage coupled with an actual and bona fide assumption of marital relations, and considering the character of the attack on the validity of the marriage, it is obvious that the exclusionary ruling was proper and may be sustained at this stage of the proceedings on this ground alone.

[11] There is, however, another and more fundamental ground which not only is controlling at this stage of the proceedings but presumptively will be controlling on the trial as well. On this record it is immediately obvious that the very evidence offered to show the invalidity of the ceremonial marriage was properly excluded because that same evidence shows that Noah is estopped to assert the claimed invalidity of the Nevada divorce. With full knowledge of the circumstances under

which that divorce was obtained, and in reliance on such divorce, Noah went through a marriage ceremony and lived with Carol as her husband for many years. The public policy of this state, in the circumstances of this case, as in those considered in *Rediker v. Rediker* (1950), 35 Cal.2d 796, 808, 221 P.2d 1, 20 A.L.R.2d 1152, requires recognition of the second marriage rather than the “dubious attempt to resurrect the original” marriage. (See also *Watson v. Watson* (1952), 39 Cal.2d 305, 307, 246 P.2d 19.)

Noah urges that the public policy applicable here is stated in section 150.1 of the Civil Code, which provides that “A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.” But we are not considering the “force or effect” of the Nevada decree except as such consideration is necessarily incident to the holding that Noah, because of his conduct with relation to that decree, has no standing to question it.

Since we have determined that Noah’s offer of proof shows that he is estopped to question the Nevada decree, it is unnecessary, either in respect to the order directly concerned or for the guidance of the court at the trial on the merits, to pass upon the correctness of the other stated grounds of the trial court’s exclusionary ruling.

Noah claims that the amount awarded for support is excessive, beyond his ability to pay, and does not take into account Carol’s separate income. The total annual amount which Noah is required to pay for support of Carol and the children (including insurance and county taxes on the home where Carol and the children live) is \$49,030.61. According to the wife’s questionnaire, necessary expenses of herself and the children are \$5,028.85 monthly and her separate income is \$1,100 monthly. There is evidence that these figures are substantially correct. Noah’s net income for 1950, after payment of income taxes, was \$197,139.32; the expense of maintaining the family, with Noah living in the family home (from which he has since moved), was \$85,567.76. An in-

crease of about \$20,000 in taxes for the year 1951 was expected. According to the husband's questionnaire, his necessary annual expenses total \$14,820.

[12] If the above figures are accepted it appears that Noah would have the ability to pay the amount awarded. His contention that he did not have such ability is based in part upon a view of his estimated income less favorable than that accepted by the trial court and in part upon considering the award of attorney fees as if it were part of the support award.

[13, 14] Noah is correct in his statement of the proposition that a wife is not entitled to temporary alimony when she has independent income sufficient to enable her to support herself. (*Loeb v. Loeb* (1948), 84 Cal.App.2d 141, 146, 190 P.2d 246; *Spreckels v. Spreckels* (1952), 111 Cal.App. 2d 529, 533, 244 P.2d 917.) But he does not show that the trial court ignored this rule. The monthly amount of the award for support is approximately \$4,087. As stated above, Carol offered evidence that the amount required was approximately \$5,028.85. Thus the total amount available to her, with her own separate income of \$1,100, is approximately the amount which she requested and testified that she required. From this we may assume that the trial court took into account her separate income when it fixed the amount of the award.

[15] Noah complains that the award of \$10,000 on account of Carol's attorneys' fees was excessive. The situation is similar to that in *Pope v. Pope* (1951), 107 Cal. App.2d 537, 539, 237 P.2d 312: "In determining the amount of a reasonable fee the trial court is permitted to consider various factors: The nature of the litigation, its complexity, the nature and extent of the contest, the amount involved, the financial circumstances of the parties, the skill required, the professional standing and reputation of the husband's attorneys and of the attorneys selected by the wife, are some of the relevant matters to be considered. [Citations.]"

[16] Here the litigation is complicated and vigorously contested; the amounts in-

involved are considerable (according to the wife's questionnaire the net worth of community property exceeds \$2,500,000; according to the husband's questionnaire his net worth is \$1,014,626); and the standing and ability of counsel are high.

For the reasons above stated the order appealed from is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, and SPENCE, JJ., concur.

EDMONDS, J., concurs in the judgment.

CARTER, Justice (concurring and dissenting in part).

I concur in the conclusion reached, but dissent from that part of the opinion which holds that the defendant may not, *on the trial of the case*, offer proof of the invalidity of the plaintiff's divorce from her first husband.

The existence of an estoppel is a question of fact, 10 Cal.Jur. 656; *Gump v. Gump*, 42 Cal.App.2d 64, 108 P.2d 21; *Assets Corporation v. Perrin Properties*, 48 Cal.App.2d 220, 119 P.2d 375; *Judelson v. American Metal Bearing Co.*, 89 Cal.App. 2d 256, 200 P.2d 836, and the burden of proof is on the party asserting the doctrine. *Garrett v. Cook*, 89 Cal.App.2d 98, 200 P.2d 21.

The vital principle of equitable estoppel is that he who by his language or conduct leads another to do *what he would not otherwise have done* shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Four things are essential to the application of the doctrine: (1) *The party to be estopped must be apprised of the facts*; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) *the other party must be ignorant of the true state of facts*; (4) the other party must rely upon the conduct to his injury. Defendant's offer of proof showed that plaintiff went to Nevada for the sole purpose of obtaining a decree of divorce; that she did not remain in that state continuously for the six weeks' period of residence which is the jurisdictional prerequi-

site demanded by that forum; that defendant did not know, prior to November, 1951, of the invalidity of the Nevada judgment of divorce awarded to plaintiff from her first husband; that there is no evidence that defendant aided, assisted, or counseled plaintiff to procure a decree of divorce in Nevada. An objection was sustained by the trial court to this offer of proof. Plaintiff offered no evidence controverting defendant's allegations. It would appear to me that on the record here the first element of an estoppel is missing—that the party to be estopped must be apprised of the facts—in that defendant did not know of the invalidity of the Nevada divorce; the second element is present—defendant married plaintiff intending that his conduct be acted upon; the third element is missing—plaintiff was not ignorant of the true state of facts; the fourth element is probably present—plaintiff relied upon the marriage to defendant although the element of injury is problematical. Upon the trial, if defendant is permitted to litigate the question, plaintiff will also be permitted to introduce evidence which may have the effect of supplying the missing elements.

In previous cases where one spouse has been held estopped from denying the validity of a previous divorce, additional elements have been present. The estopped spouse has aided, abetted, counseled, or actively participated by paying the expenses, etc., in the procurement of the fraudulent divorce. In *Rediker v. Rediker*, 35 Cal.2d 796, 806, 221 P.2d 1, 7, 20 A.L.R.2d 1152, we said "The doctrine of estoppel has also been held applicable to cases in which a husband sought to assert the invalidity of his or his wife's earlier divorce from another as a defense to her action for divorce and alimony." Cited as authority are *Margulies v. Margulies*, 109 N.J.Eq. 391, 392, 157 A. 676, and *Van Slyke v. Van Slyke*, 186 Mich. 324, 330, 152 N.W. 921. Both of these cases held estopped a spouse who had actively participated in the procurement of a fraudulent divorce which he later sought to have declared invalid. I feel, therefore, that under the facts as here presented, this Court should not preclude defendant from

offering proof at the trial of the invalidity of plaintiff's Nevada decree of divorce.

While I feel that in view of the services rendered, the amount awarded is excessive, I do not feel that I should say that the award of attorneys' fees in this case is an abuse of discretion.

A ceremonial marriage between plaintiff and defendant having been established the court could properly exercise its discretion in making a preliminary award of alimony pendente lite, attorneys' fees and costs without hearing evidence as to the invalidity of the marriage, reserving to the trial on its merits the consideration of such evidence.

I, therefore, concur in the affirmance of the award.



120 Cal.App.2d 565

PELTON MOTORS, Inc. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 19848.

District Court of Appeal, Second District,
Division 1, California.

Oct. 6, 1953.

Petition for writ of mandate requiring respondent superior court to quash a subpoena duces tecum issued by such court in action for salesman's commissions allegedly earned and unpaid, brought against retail dealer and distributor of passenger automobiles and trucks by former salesman in defendant's new passenger automobile department only. The District Court of Appeal, Robert H. Scott, J. pro tem., held that the subpoena duces tecum was too broad and was unfair to petitioner.

Peremptory writ of mandamus ordered to issue as prayed.

I. Searches and Seizures ☞7(1)

Witnesses ☞16

A party or witness has constitutional right to be free from unreasonable searches

and seizures, and it is therefore incumbent upon one seeking an inspection to show clearly that he has a right thereto and that constitutional guaranties will not be infringed, and affidavit in support of demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to issues to be tried. Code Civ.Proc. §§ 1000, 1985.

2. Witnesses ☞16

Approved method of testing relevancy and materiality of documents required by subpoena duces tecum is to move to quash, vacate or modify it. Code Civ.Proc. §§ 1000, 1985.

3. Witnesses ☞16

A witness upon whom has been served a subpoena duces tecum has right to question validity of writ and duty to produce papers called for, and where a subpoena has been improperly issued to enforce production of documents which witness is not bound to produce, and his rights are invaded by it, he may properly apply to court, whose duty it would be to enforce writ, to vacate it or set it aside. Code Civ.Proc. §§ 1000, 1985.

4. Witnesses ☞16

In action for commissions, brought against retail dealer and distributor of passenger automobiles and trucks by former salesman in defendant's new passenger automobile department only, subpoena duces tecum requiring defendant's president to appear and testify as witness and to bring with him defendant's sales journal and sales ledger covering specified period of time, which contained accounts between plaintiff and defendant and all contracts between defendant and defendant's sales department employees during such time, was too broad and was unfair to defendant under record.

Glenn S. Roberts, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Los Angeles, and Wm. E. Lamoreaux,

Deputy County Counsel, Los Angeles, for respondents.

ROBERT H. SCOTT, Justice pro tem.

Petitioner seeks a writ of mandate requiring respondent court to quash a subpoena duces tecum issued by it in case 611606 entitled Gene Tyler, plaintiff v. Pelton Motors, Inc., et al., defendants. The real party in interest in this proceeding is Gene Tyler, the said plaintiff. He has not filed any opposition to the endeavor of petitioner to have the subpoena duces tecum quashed.

Plaintiff in that case, Gene Tyler, has brought an action against defendant, Pelton Motors, Inc., setting out in his second amended complaint two common counts for alleged salesman's commissions earned and unpaid, the first count being for money had and received and the second count being on an open book account. These claims in the complaint were denied and an affirmative defense set up by defendant in its answers.

Attorney for plaintiff Tyler filed an affidavit asking for the issuance of a subpoena duces tecum and setting out that he desired to inspect: "*Pelton Motors, Inc. sales journal and sales ledger covering the period 1946 and 1953, inclusive, ledger containing accounts between Pelton Motors, Inc. and Gene Tyler, covering the period 1946 and 1953, inclusive, and all contracts between Pelton Motors, Inc., and its Sales Department employees which were entered into between 1946 and 1953, inclusive*". (Emphasis added.)

His reason for the request is stated to be: "That said books, records and documents are material to the issues of fact in this case in that they will show or tend to show the basis on which the amounts, due to plaintiff for work, labor and services for the defendants, were computed; the reasonable value of said work, labor and services; the specific date on which the obligation sued upon herein was entered into; the dates of performance of the said work, labor and services; the transactions by virtue of which defendants became indebted to plaintiff; the fact that no part of the amount claimed by plaintiff has been paid;

and the validity and significance of the agreements and contracts referred to in the First Affirmative Defense contained in Defendant's Answer to Second Amended Complaint."

The first affirmative defense recited plaintiff's original employment agreement and set out that there had been an accord and satisfaction agreement entered into on March 28, 1949, and that there had been a new employment agreement starting April 1, 1949, and ending when plaintiff terminated his employment, and was paid in full by defendant.

The subpoena duces tecum was issued directing William A. Wegge Jr., president of Pelton Motors, Inc., to appear and testify as a witness and to bring with him the corporation's sales journal and sales ledger 1946 to 1953, inclusive, containing accounts between the plaintiff and the corporation "and all contracts between Pelton Motors, Inc., and its Sales Department employees" 1946 to 1953, inclusive.

Motion to quash said subpoena duces tecum was denied by respondent court.

In its verified petition seeking a writ of mandate addressed to this court Pelton Motors, Inc., sets out the following:

"XI

"That petitioner is now, and for the past 32 years has been engaged in business in Los Angeles County as a retail dealer and distributor of passenger automobile and trucks. That during the period of 1946 and 1953, which period plaintiff seeks to inspect all sales ledgers, sales journals and all contracts with sales employees, the petitioner engaged in business as a wholesale and retail distributor of passenger cars, trucks, parts and accessories and covering a large area of Los Angeles County and supplying passenger cars and trucks to numerous retail dealerships. Also petitioner operated as a wholesale distributor of automobile parts, selling to dealers, garages, and the trade generally in Southern California. That during said period petitioner operated a separate branch dealership for the sale and service of commercial vehicles and parts in the commercial area of Los Angeles on Seventh Street, and a separate re-

tail branch dealership in the Hollywood area, conducted as a separate dealership, together with the main store on Figueroa Street, Los Angeles, where new passenger cars, trucks, parts and service operation store conducted as separate departments. The used car operations is operated as a separate establishment and at a separate location; and a separate establishment at a separate location handles paint, body and upholstering activities; that the various departments have separate sales organizations and each such selling organization is, generally speaking under the supervision of a separate executive employee. That during the period from 1946 to 1953, covered by said Subpoena Duces Tecum, petitioner has employed more than 300 employees at one time and has produced gross sales in excess of seventeen million dollars for one year. That the records of such sales which petitioner has been ordered to produce for the inspection of plaintiff are voluminous and the greater part of such records have been placed in dead storage and some of such records may have been destroyed or otherwise disposed of. That during the said period aforesaid petitioner has had innumerable contracts covered by the Subpoena under the designation 'all contracts between Pelton Motors, Inc., and its sales department employees which were entered into between 1946 and 1953, inclusive', and including contracts with its president, general manager, sales managers of the various departments down to the several hundred sales employees engaged by petitioner during such period. It is obvious that the expense to the petitioner of producing the books, records and contracts ordered by the Subpoena Duces Tecum would be great, and it is equally obvious that the Subpoena is too general and broad in its terms.

"XII

"The plaintiff was employed by petitioner beginning April 1, 1946 and plaintiff's services with petitioner terminated on March 14, 1953. That during such entire period, plaintiff acted as a salesman in the new passenger car department only. That the Subpoena Duces Tecum herein orders petitioner to produce books, records and contracts for the period in 1946 prior to plaintiff's

employment by petitioner, as well as the period in 1953 after plaintiff left petitioner's employment.

"XIII

"That the said plaintiff at the time of filing the aforesaid action and at the present time is employed by an automobile dealership, a business competitor of petitioner, and said plaintiff is now in active business competition with petitioner."

The subpoena duces tecum under consideration in this proceeding is too broad in its scope and is obviously unfair to petitioners. No reason appears why the rights of Gene Tyler, plaintiff in the case now pending in the trial court, cannot be fully protected if the subpoena duces tecum heretofore issued is quashed. Such a subpoena limited to the production of records of his former employer which cover the dealings between them would be adequate to produce any material evidence which would be admissible at the trial.

The principles covering the issuance of subpoenas duces tecum under Sec. 1985, Code of Civil Procedure, as well as proceedings under Sec. 1000, Code of Civil Procedure, are discussed in September, 1953 issue of Los Angeles Bar Bulletin, Volume 28, No. 12.

[1] "A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried." *McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 396, 159 P.2d 944, 950.

[2, 3] The approved method of testing the relevancy and materiality of documents required by a subpoena duces tecum is to move to quash, vacate or modify it. A wit-

ness upon whom has been served a subpoena duces tecum has a right to question the validity of the writ and the duty to produce the papers called for, and where a subpoena has been improperly issued to enforce the production of documents which the witness is not bound to produce, and his rights are invaded by it, he may properly apply to the court, whose duty it would be to enforce the writ, to vacate it or set it aside. *Southern Pac. Co. v. Superior Court*, 15 Cal.2d 206, 209, 100 P.2d 302, 130 A.L.R. 323. This was the procedure followed in this case by the petitioner herein, but its application to the trial court for relief was denied, making it necessary for it to apply to this court.

"In determining the question of materiality of the records sought to be inspected, the trial court was not limited to a consideration of the affidavit, but also was entitled to consider the contents of the pleadings filed in the case which showed, or might show, the materiality of the evidence sought to be obtained. *MacLay Rancho Realty Co. v. Superior Court*, 81 Cal.App. 471, 254 P. 287." *Union Trust Co. v. Superior Court*, 11 Cal.2d 449, 455, 81 P.2d 150, 154, 118 A.L.R. 259.

[4] We have examined the original file which was before the trial court including a "Bill of Particulars" filed by plaintiff. We have considered other cases in which comparable situations have required attention by an appellate tribunal, including the recent cases of *Los Angeles Transit Lines v. Superior Court*, 119 Cal.App.2d 465, 259 P.2d 1004, and *Lewis v. Superior Court*, 118 Cal.App.2d 770, 258 P.2d 1084. We have concluded that under the legal principles set out in these cases, and considering the entire record in the case now before us, petitioner has made a showing which entitles it to a writ of mandate issued by this court.

It is ordered that the peremptory writ of mandate issue as prayed.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 488

EVJE v. CITY TITLE INS. CO. et al.

Civ. 15535.

District Court of Appeal, First District,
Division 2, California.

Sept. 30, 1953.

Rehearing Denied Oct. 30, 1953.

Actions involving question whether notes secured by trust deed had been paid in full so that trust deed should be reconveyed. The Superior Court, City and County of San Francisco, Robert McWilliams, J., entered judgment for a defendant, and the plaintiff-cross-defendant appealed. The District Court of Appeal, Nourse, P. J., held that evidence supported finding that certain amount remained unpaid on note.

Judgment affirmed.

1. Appeal and Error ⇐1008(1)

In order for appellate court to render decision rejecting testimony believed in trial court, such testimony must be wholly unacceptable to reasonable minds.

2. Mortgages ⇐319(3)

In actions involving question whether note secured by trust deed had been paid in full, where person who was actual beneficiary under trust deed testified that full amount had not been paid, although there were alleged admissions and documentary evidence which indicated that note had been paid in full, evidence sustained finding that a certain amount remained unpaid on note.

James A. Himmel, San Francisco, for appellant.

George V. Curtis, San Francisco, for respondent.

NOURSE, Presiding Justice.

The reciprocal actions in the case involve the sole question whether a promissory note of \$12,000 payable to defendant and cross-complainant Emma De Voto, further called De Voto, signed in April, 1929, by certain Mohr's Incorporated, further called Mohr's, and secured by a deed of trust on certain tract of land in San Francisco, of which plaintiff and cross-defendant A. W. Evje, further called Evje, acquired a parcel in November, 1950, has been paid in full so

that the deed of trust should be reconveyed or that part of the indebtedness and interest, taxes, et cetera, remain unpaid so that De Voto is entitled to satisfy said obligation by sale of the property owned by Evje. The court gave judgment for De Voto and Evje appeals. Defendant City Title Insurance Company, the trustee under the deed of trust, has agreed by stipulation to be bound by any judgment rendered herein and is not a party to the appeal.

Emma De Voto had no personal interest in or knowledge of the transaction but was merely the nominee, agent or trustee of her brother Stephen Capurro, herein further called Capurro. Capurro had owned the tract, sold it to Mohr's, who planned to parcel it and build houses on the lots, for \$19,000 of which \$7,000 in cash and \$12,000 in the above note and second deed of trust made payable to De Voto. The deed of trust, received in evidence, contained a provision to the effect that when lots on which houses had been built were sold Mohr's would assign to Capurro notes and deeds of trust given by the purchasers, or at Mohr's option pay cash instead. The purchaser's notes would be accepted by Capurro at their full face value as payment on the \$12,000 note but Mohr's guaranteed their payment in full. Capurro would release from the original deed of trust the lots sold for which he had received purchaser's notes and deeds of trust. The note of \$12,000 would be cancelled when paid in full by the assigned notes and/or cash. Capurro, heard both as adverse witness under section 2055, Code of Civil Procedure, and in his own behalf and cross-examined at length, declared repeatedly under oath that he had received on account of the \$12,000 note nothing but the assignment of five purchaser's notes and deeds of trust totaling \$9,783.96 a few months after the original transaction in April, 1929, and one payment on March 5, 1930 of \$450, a total of \$10,233.96 plus some interest payments, so that a balance of \$1,766.04 of the principal, interest, et cetera, remained unpaid. The judgment is in accordance with this testimony.

Appellant's only contention is that documentary evidence and admissions of Ca-

purro so strongly show the falsity of Capurro's above evidence and the payment in full of the \$12,000 note that the cited evidence could not cause a substantial conflict, or, as we prefer to state it, that the appellate court may reject it, although it was believed by the trial court. The main circumstances shown at the trial on which appellant relies are the following: At the trial Capurro could not produce the note for \$12,000, which circumstance might indicate that he had returned or destroyed it after full payment, although he testified that he had never received it. He had no records of what he had received except eight successive pass books on the Excelsior Branch of the Bank of America in the name of De Voto, which were received in evidence. According to Capurro's testimony they contained the payments on the assigned purchaser's notes and the payment of \$450, nothing else. However in one of these books was found an initial entry of a payment received on April 10, 1929 (prior to the assignments) in the amount of \$2,174.65. Capurro denied that this represented a payment on the \$12,000 note; he first said that it was carried over from another bank book and when this proved impossible because the bank book was the earliest in chronological order he could only say that he did not know what the amount represented. It is further pointed out that Capurro on August 23 and August 31, 1929, signed authorities to reconvey a total of eleven lots although he had received purchasers' notes and deeds of trust only as to five lots and the original deed of trust as to the \$12,000 did not require him to release any of his security without receiving such purchasers' deeds of trust. Capurro testified that the reconveyances were not based on any payment or assignment except the five assignments mentioned. No payment or assignment was made by Mohr's after March 5, 1930. Nevertheless Capurro did not take any legal action against Mohr's or any step to sell the one lot not released until it was acquired by plaintiff in 1950. In October, 1940, Capurro and Mohr's made an agreement with respect to a collateral transaction involving one of the lots in which transaction Mohr's advanced

\$300 to Capurro which Capurro agreed to pay back from the sales price or rent of the property. The letter in which this agreement is embodied does not contain any reference to the amount of \$1,700 plus interest long due at that time according to Capurro.

Respondent does not try to explain any of these peculiar circumstances, but takes the position that they only cause a conflict with Capurro's testimony resolved by the trial court in respondent's favor. We have come to the conclusion that on the basis of the authorities respondent's position must be sustained.

[1] "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category [citation]. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]" *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759; *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal.2d 176, 183, 195 P.2d 427; *Cox v. City of Los Angeles*, 100 Cal.App.2d 378, 381, 223 P.2d 868. There are expressions—nearly all dicta—in one form or another to the effect that an appellate court will reject testimony inherently improbable or impossible of belief in some forty civil cases collected in 2 McKinney's Digest, Appeal and Error, § 1267. However, only in one of these cases did the appellate court actually reject as unbelievable testimony believed by the trier of facts, and that one case, *Lind v. Closs*, 1891, 88 Cal. 6, 25 P. 972, is a rape case in which the Supreme Court rejected the testimony of the complaining witness so that the subject matter gives it an exceptional character. The absence of decisions rejecting testimony be-

lieved in the trial court is understandable when we see that for rejection it is required that the testimony be "wholly unacceptable to reasonable minds," Kircher v. Atchison, T. & S. F. Ry. Co., supra [32 Cal. 2d 176, 195 P.2d 433]; "unbelievable *per se*", Lane v. Safeway Stores, Inc., 33 Cal. App.2d 169, 175, 91 P.2d 160, such that "no reasonable person could believe the testimony." Tamble v. Downey, 104 Cal.App. 2d 810, 812, 232 P.2d 543, 544. It has even been held that an appellate court will not substitute its evaluation of the evidence or its opinion as to the credibility of the witnesses for that of the trial court "even though to some triers of fact the evidence * * * would have seemed so improbable, impossible and unbelievable that a judgment contrary to that * * * on appeal would have inevitably followed." Romero v. Eustace, 101 Cal.App.2d 253, 254, 225 P. 2d 235, 236.

[2] We cannot say that the testimony of Capurro that he received certain payments and assignments only is *inherently* improbable or that even in combination with the true facts related it cannot be believed by any reasonable man. The trial judge believed it. Although very strange it is not wholly inconceivable that Capurro with extraordinary slackness and carelessness would have for many years left the whole matter to Mohr's (there was some evidence of Capurro to that effect) and would only have been reminded of the existence of an unpaid balance by the transfer of the lot. Neither would it be wholly inconceivable that Capurro deposited the initial amount of \$2,174.65 in the name of his sister, although it did not relate to the real estate transaction, for the same reason for which the deed of trust was made out in her name which reason he did not divulge at the trial, and that after twenty years he no longer knew where the money came from.

Under the authorities cited we can not disturb the factual decision of the trial court. Appellant's authorities, cases in which it was held that certain evidence did not cause a substantial conflict or did not support the verdict, are not in point because

in none of them was evidence rejected on appeal which consisted of direct testimony under oath to the essential facts in dispute by a witness who had the best personal knowledge of the facts to which he testified.

Judgment affirmed.

GOODELL, J., concurs.



120 Cal.App.2d 554

EGER v. MAY DEPARTMENT STORES et al.

Civ. 19691.

District Court of Appeal, Second District,
Division 1, California.

Oct. 5, 1953.

Action by customer against department store for injuries sustained when customer allegedly fell, in store's parking lot, over whiskey bottle which store had failed to remove. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered judgment on verdict for store and denied customer's motion for new trial, and customer appealed. The District Court of Appeal, Scott, J. pro tem., held that evidence was sufficient to sustain jury's implied finding that injuries were not due to store's negligence.

Judgment affirmed.

I. Evidence ↪507

In action by customer against department store for injuries sustained when customer allegedly fell in store's parking lot, over whiskey bottle which store had failed to remove, expert testimony concerning what would be reasonably necessary, in exercise of common practice, to clean the parking lot could not have misled jury and was not erroneously admitted on ground that matter was one within common experience of ordinary persons. Code Civ. Proc. § 1870, subd. 9.

2. Evidence ⇨470

Opinions of nonexpert witnesses are admitted, as matter of practical necessity, when matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. Code Civ. Proc. § 1870, subd. 9.

3. Evidence ⇨508

Ultimate question to be determined in every case in which expert testimony is tendered is whether case is one outside of common experience of men so that person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts. Code Civ.Proc. § 1870, subd. 9.

4. Evidence ⇨508

Where facts concerning condition of subjects of investigation cannot be made palpable to jurors so that their means of forming opinions are practically equal to those of witnesses, opinions of such witnesses may be received along with such facts supporting them as witnesses may be able to place intelligently before the jury. Code Civ.Proc. § 1870, subd. 9.

5. Torts ⇨27

Plaintiff in tort action was not required to avoid all inconsistencies in evidence which she made available to jury, but was required to produce competent and persuasive evidence, and, by such evidence, and reasonable inferences based thereon, prove her case by preponderance of evidence.

6. Negligence ⇨134(3)

In action by customer against department store for injuries sustained when customer allegedly fell, in store's parking lot, over whiskey bottle which store had failed to remove, evidence was sufficient to sustain jury's implied finding that injuries were not due to store's negligence.

7. Appeal and Error ⇨1050(2)**Negligence** ⇨124(1)

In action by customer against department store for injuries sustained when customer allegedly fell, in store's parking lot, over whiskey bottle which store had failed to remove, testimony that construction of

parking lot was consistent with good engineering practice in the locality was not relevant, but admission of such testimony was not prejudicial in view of fact that it was doubtful whether jury had been impressed thereby.

8. Appeal and Error ⇨172(2)

Where issue of improper construction of parking lot had not been raised by pleadings and was not before jury in action for personal injuries sustained in fall in parking lot, such issue could not be presented for first time upon appeal.

Morton E. Feiler and Newell & Chester, Los Angeles, by Robert M. Newell, Los Angeles, for appellant.

Eugene S. Ives, Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment pursuant to verdict. She also states that she appeals from an order denying her motion for a new trial.

As a customer of defendant's department store, at three o'clock in the afternoon of March 14, 1950, plaintiff entered the parking area adjoining the Appliance Annex of defendant's Fairfax Avenue and Wilshire Boulevard Store in the city of Los Angeles. In her amended complaint plaintiff alleges that defendant negligently permitted empty whiskey bottles to be placed and to remain in this parking area; that as a direct and proximate consequence of the negligence of defendant in maintaining the parking area and in permitting empty whiskey bottles to be placed and to remain in the parking area plaintiff slipped and fell and sustained personal injury.

On appeal plaintiff asserts that defendant, "negligently maintained the parking area behind the Appliance Annex as a result of which an empty whiskey bottle and other debris accumulated in a place reserved for use of the customers at the store; that the plaintiff slipped and fell on this whiskey bottle and suffered various personal injuries".

She describes the parking area as follows:

"The parking lot is covered with black-top and there are white-washed 4x6 timbers running in a north-south direction with painted white lines marking the spaces for diagonal parking. At the northern tip of each of the 4x6s there is a triangular area bounded by white-washed 4x6s. The base of this triangular area runs parallel to Wilshire Boulevard and the sides of the triangle which are set at approximately 45 degree angles, more or less determine the angle of parking. The painted white lines marking off the parking spaces are approximately parallel to the respective sides of the triangle. The arrangement may be roughly compared to a skeleton of a fish with the 4x6s constituting the back bone and tail and the painted white lines the ribs of the fish."

Plaintiff fell at or near one of these triangular areas. In the triangle, according to testimony at the trial, there were an empty whiskey bottle and bits of paper, dirt and gravel. Plaintiff landed with her feet outside of the triangle and her head and body inside of the triangle. At the trial the following testimony of plaintiff was elicited:

"Q. By Mr. Ives: Now, actually, Mrs. Eger, you never saw the whiskey bottle, or whiskey bottles, yourself, did you? A. No. I didn't.

"Q. And during the last few seconds before the time when you fell, you were looking where you were going, weren't you? A. Yes, I was looking where I was going.

"Q. And when you say 'looking where you were going', you mean at the ground where you were stepping? A. Well, I, like the average person—you walk along, of course you can't always have you—you would be running into difficulties if you walked along looking on the ground, I imagine. Like any person walking to assure their safety, I walked, and here and there at times you can see the ground as well as what is ahead of you; but I'm sure I wasn't walking just looking on the ground every bit of the way, then I would have run into trouble with the traffic.

"Q. Now, you saw those triangles, didn't you? A. Yes.

"Q. And you knew those triangles were there? A. Yes.

"Q. And when the time came for you to get to those triangles you looked so you could step over them, didn't you? A. Yes.

"Q. And you did step over the triangles, didn't you? A. Yes.

"Q. So that at the time when you stepped over that triangle you were looking at the ground to see exactly where you were stepping? A. Well, I probably took only a second to look at the ground and then, naturally, I lifted my eyes and, of course, a whiskey bottle, or part of it, could have protruded from under that opening. There is an opening under those guards, so it could have been under there and perhaps just a bit of it with the other debris that was lying there extending, which my heel or something caught into—of course I can't tell you how I fell, I only know I fell on something, stepped on something.

"Q. You don't know anything yourself about how you fell, do you? A. Other than that I stepped on something and fell, and that is all I have of a clear recollection of my accident."

Two points are made by plaintiff on appeal. First she declares that the trial court erred in permitting the following question to be asked by defendant's counsel, and the answer given by the witness Shields.

"Q. Now, do you have an opinion on such a self-service lot as you have here at the May Company Department Store, the Wilshire Department Store, as to how often it is reasonably necessary in the exercise of common practice to clean that parking lot? * * * A. I would say that once per week would be sufficient with periodic inspections in between to catch any unforeseen accumulation or debris or foreign matter."

The witness had testified as to his extensive experience and activities relating to parking lots. The answer was developed and expanded on cross-examination of the witness by plaintiff's counsel as follows:

"Q. By Mr. Newell: Mr. Shields, I believe you stated you thought that a cleaning of this place once a week with periodic

inspections in between would be reasonably good care? A. I do.

"Q. And what you mean when you say 'periodic inspection' is, say, like every hour?

A. No, I would think twice a day, or even once a day, depending on what they find; I mean, that is all a matter of—I would say around Christmas time it would require more inspections than other times.

"Q. In other words, maybe like the days when they have a lot more people, inspect more often than the days they know they normally don't have as many? A. I don't know, I am just guessing at that, but that would be from a practical standpoint my answer, yes."

[1] Plaintiff asserts that it was prejudicial error for the trial court to permit the witness to answer the question first above quoted because "the matter was one within the common experience of ordinary persons". It cannot be said, however, that the question and answer were erroneous or that they could have misled the jury. While ordinary persons have experience in the use of parking areas, that does not include knowledge of the operations needed to clean and maintain these areas.

[2-4] "The opinions of nonexpert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. (Citing authorities.)

"* * * The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts. * * *

"It must not be supposed that there is any rule of evidence concerning the opinions of witnesses which is peculiar to fences, highways, bridges, or steam-boats, or to any other special subjects of investigation. Where the facts concerning their condition cannot be made palpable to the jurors so that their means of forming opinions are practically equal to those of the

witnesses, opinions of such witnesses may be received, accompanied by such facts supporting them as they may be able to place intelligently before the jury.'" *Manney v. Housing Authority*, 79 Cal.App.2d 453, 459 to page 461, 180 P.2d 69, 73; see also, *Burch v. Valley Motor Lines, Inc.*, 78 Cal.App.2d 834, 179 P.2d 47.

"Section 1870, subdivision 9 of the Code of Civil Procedure specifically grants to a witness the right to express his 'opinion on a question of science, art, or trade, when he is skilled therein.' To attach to that section limitations of the nature proposed by the defendants (in the instant case the plaintiff) would be to restrict unduly the province of the opinion evidence, for if that section is to have any degree of efficacy, then of necessity it must be viewed in the light of liberality. It might be said with little fear of contradiction, that rarely, if ever, does an expression of opinion by a so-called expert not amount to that which either the court or jury might adopt as a basis for the ultimate decision in the case. However, that does not mean that the witness is deciding the case or that in so testifying he is usurping the functions of the jury. He is merely giving an opinion based upon his technical training which the court may or may not accept as testimony that 'was proper and necessary to an enlightened consideration and a correct disposition of the ultimate issue.'" *Wallace v. Speier*, 60 Cal.App.2d 337, 394, 140 P.2d 900, 904.

[5, 6] A critical analysis of plaintiff's evidence as to how the accident happened requires consideration of her testimony above quoted, her surgeon's statement that her injuries were caused by her falling backward with her foot fixed rigidly in position, together with the other evidence that she landed with her feet *outside* of the triangle. She suggests that the jury might reasonably have inferred that she slipped *inside* of the triangle, that her foot slid forward so that her toe came between the asphalt surface and the bottom of one of the 4x6s and was held rigidly in position as she fell. In her closing brief plaintiff suggests that after she had fallen her feet were wrenched loose from under-

neath the 4x6 and her legs flopped across the 4x6 in a northerly direction at the conclusion of her fall; that she was inside the triangle as she slipped, even though part of her body was outside the triangle after she fell. While plaintiff was not required to avoid all inconsistencies in evidence which she made available to the jury, it was essential that she produce competent and persuasive evidence, and that by such evidence, and reasonable inferences based thereon, she prove her case by a preponderance of evidence. This she obviously failed to do. The implied finding of the jury that plaintiff's injuries were not due to negligence of defendant cannot be said to be erroneous on the basis of the record before us on appeal.

As the sole remaining point on which plaintiff bases her appeal she directs attention to a question asked of the witness Shields, the objection and ruling thereon and his answer as follows:

"Q. Now, from the investigation that you have made, Mr. Shields, and your knowledge of similar parking lots in this district, will you state whether or not you have an opinion as to whether this particular parking lot in its details as to construction and as to material is or is not consistent with good engineering practice in Southern California?

"Mr. Newell: I will object to that question, your Honor, on the ground that it calls for an opinion of the witness. It has no relevance here. Good engineering practice and what is reasonable safety are two different things. * * *

"The Court: Overruled.

"The Witness: Yes, it is designed in accordance with good engineering practice."

Faulty construction was not an issue raised by the pleadings. Plaintiff had made no claim that the parking area had been improperly laid out, marked and equipped. The answer of the witness that "it is designed in accordance with good engineer-

ing practice" would in no way absolve defendant of negligence if plaintiff had shown that defendant was guilty of some negligent act or omission in maintaining it. The question and answer might well have been omitted. It is doubtful whether the jury were impressed by the one question and answer on direct examination of the witness by defense counsel. They had not been told that they must decide whether the parking area was properly constructed. The issue before them was whether defendant had been negligent in maintaining it.

On appeal plaintiff declares that "the question to be decided by the jury was whether or not the parking lot had been constructed in a negligent fashion" and that "the jury might have found the defendant negligent in the manner in which it placed the 4x6s on the parking lot" because it had left an air space of 1½ inches between the surface and the bottom of the 4x6s.

[7,8] These suggestions are not consistent with plaintiff's pleadings or with the theory on which the case was tried. When plaintiff's counsel interposed his objection to the question last above quoted addressed to Mr. Shields, on the ground that it was not relevant, this objection was correct. Since the issue of improper construction was not raised by the pleadings and was not before the jury for decision in the trial court, it cannot be presented for the first time on appeal. It is doubtful whether the jury could or would have found that there was any defect in plan or construction if the issue had been before them.

The case of *Blinkinsop v. Weber*, 85 Cal. App.2d 276, 193 P.2d 96, and other cases cited by defendant as justification for having asked the question assailed by plaintiff are so readily distinguishable from the case now before us as to require no discussion.

The attempted appeal from the order denying motion for new trial is dismissed. Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 495

BIXBY v. BIXBY.

Civ. 4592.

District Court of Appeal,
Fourth District, California.
Sept. 30, 1953.

Divorce action on ground of extreme cruelty. Defendant filed cross-complaint alleging extreme cruelty and demanding support, attorneys fees, and separate maintenance, and award of community property. The Superior Court, San Diego County, C. M. Monroe, J., granted plaintiff interlocutory decree of divorce, and denied defendant relief on cross-complaint, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence sustained decree of divorce to plaintiff, and denial of relief to defendant on her cross-complaint.

Affirmed.

1. Divorce ⇨130

In divorce proceeding, evidence sustained finding that defendant had treated plaintiff with extreme cruelty, and had wrongfully inflicted upon him grievous mental suffering.

2. Divorce ⇨27(7)

Proof of extreme cruelty may be made by testimony of cruel remarks made by one spouse to other.

3. Appeal and Error ⇨1008(1)

District Court of Appeal cannot disturb finding of trial court based upon reasonable analysis of facts and circumstances presented, unless abuse of discretion appears.

4. Divorce ⇨184(12)

Fact that trial judge required defendant in divorce suit to testify about her personal life prior to marriage, was not ground for reversal of decree granting divorce to plaintiff, where trial court's decree was not based upon such testimony.

5. Appeal and Error ⇨1054(1)

Where there is competent independent evidence in record which supports judgment appealed from, without recourse to testimony allegedly erroneously admitted, generally such error is not prejudicial as it will be presumed on appeal that trial judge considered and relied upon compe-

tent evidence in making findings and rendering judgment.

6. Divorce ⇨127(4)

In divorce proceeding, testimony of plaintiff upon which extreme cruelty charged was based, was sufficiently corroborated by testimony of several witnesses.

7. Divorce ⇨127(4)

Where number of charges of cruelty have been made corroboration of single act may be sufficient to sustain decree of divorce.

8. Divorce ⇨147, 184(10)

Infliction of grievous mental suffering is question of fact to be decided from circumstances of each divorce case, in light of intelligence, refinement and delicacy of sentiment of complaining party, and correct decision will depend upon sound sense and judgment of trial court, whose conclusion will not be disturbed on appeal unless evidence is so slight as to indicate an abuse of discretion.

9. Divorce ⇨184(3)

Defendant's request that certain press pronouncements be considered on appeal from decree of divorce as evidence of plaintiff's activities since commencement of divorce proceeding, would be refused where such evidence was cumulative and would only result in additional conflict, without compelling reversal of judgment.

10. Husband and Wife ⇨264

In divorce proceeding, evidence sustained finding that plaintiff's interest in certain trust fund was his separate property.

11. Divorce ⇨249(3)

In action for divorce only community property and homestead may be awarded, as court is not authorized to assign separate property of one spouse to other, nor to require one to pay to other any amount in lieu of assignment or division thereof.

12. Divorce ⇨286

Judgment in divorce suit providing that if defendant would within 30 days file waiver and release agreement as therein set forth, defendant would be awarded \$15,000 in compensation for expectancy in

trust fund, did not prejudice defendant and she could not complain, where trust fund was separate property of plaintiff, and any award obtained by defendant in such trust fund gave defendant more than that to which she was entitled.

13. Appeal and Error ⇐161

The rule that voluntary acceptance of benefit of judgment or order bars appeal therefrom has no application where benefits accepted are such that acceptor is admittedly entitled to them, or would not be affected or put in jeopardy by the appeal.

14. Divorce ⇐178

Wife did not lose her right to appeal from divorce decree granted to husband by accepting check for \$1500 to pay fee of dentist where husband had offered to pay any reasonable bill for medical or dental services needed by wife without order of court and had requested court to make appointment for such dental care.

A. Brigham Rose, Los Angeles, for appellant.

Edgar B. Hervey, San Diego, and Henry F. Walker, Los Angeles, for respondent.

MUSSELL, Justice.

Plaintiff filed this action for divorce on July 15, 1951, alleging extreme cruelty in general terms. Defendant filed an answer and cross-complaint in which she alleged extreme cruelty on the part of her husband, demanded support and attorney's fees and sought separate maintenance, together with an award to her of the community property. After a lengthy trial, the court filed its findings of fact and conclusions of law and granted an interlocutory decree of divorce to plaintiff and denied defendant relief on her cross-complaint.

The decree contains provisions relative to the property rights of the parties, their interest in community property, temporary support, costs and counsel fees, and a provision for the disposition of defendant's expectancy in a trust involving stock in the Fred H. Bixby Company, a corporation. Subsequent to the entry of this decree, defendant moved for a new trial and after

hearing thereon, the trial court entered an order changing and adding to the findings and modifying the interlocutory decree. Defendant appeals from the decree and order.

The parties to this action were married March 5, 1940, and separated July 16, 1951. There are no children the issue of said marriage and the value of the community property was found to be \$14,380.82.

The record contains many pages of testimony relative to the conduct and reputation of the parties prior to the date of the marriage and also subsequent to the filing of the complaint. This condition of the record was brought about by the procedure followed at the trial, which was to allow the parties a wide latitude in the examination of witnesses since they had not been able to take depositions. This procedure was agreeable to counsel for appellant and the court stated in its decision that testimony of that character would be ignored and that no findings relative thereto would be made.

Substantial evidence was introduced showing that over a period of several years, during the marriage, the defendant exhibited towards plaintiff an attitude that was domineering and dictatorial and generally an attitude of holding plaintiff in contempt; that she used abusive, vile and profane language toward plaintiff and called him a "son-of-a-bitch" on several occasions. Plaintiff's testimony was corroborated by that of several witnesses, by writings and as stated by the trial court, "generally in the demeanor exhibited by defendant in her testimony". Further corroboration of the general attitude and type of language used by the defendant is found in a tape recording, in evidence, of a telephone conversation between the parties.

[1] The record contains sufficient substantial evidence to sustain the trial court's finding that the defendant has treated plaintiff with extreme cruelty and has wrongfully inflicted upon him grievous mental suffering.

[2] Proof of extreme cruelty may be made by testimony of cruel remarks made by

one spouse to the other. *Stevens v. Stevens*, 92 Cal.App.2d 85, 87, 206 P.2d 418. And as was said in *Tompkins v. Tompkins*, 83 Cal.App.2d 71, 74-75, 187 P.2d 840, 842:

"Conduct that would induce grievous mental suffering sufficient to constitute extreme cruelty depends upon the circumstances of each particular case, and the finding of a trial court based upon any reasonable analysis of the facts and circumstances as reflected by the evidence will not be disturbed on appeal."

In *Keener v. Keener*, 18 Cal.2d 445, 447, 116 P.2d 1, 2, it is said:

"Section 94 of the Civil Code defines extreme cruelty as 'the wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage'. In each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. [Citing cases.] A correct decision must depend upon the sound sense and judgment of the trial court. * * * Its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion."

[3] The findings of the trial court appear to be based upon a reasonable analysis of the facts and circumstances and cannot be here disturbed since no abuse of discretion appears.

[4, 5] Appellant contends that it was prejudicial error on the part of the court to require her to testify about her personal life before marriage. However, as was stated by the trial court, the testimony derogatory to the reputation of both parties served no useful purpose in the determination of the issues involved and would be ignored by the court. Furthermore, as was said in *Keating v. Basich Bros., Etc., Co.*, 66 Cal.App.2d 258, 263, 151 P.2d 892, 894:

"The general rule prevailing in California on this subject is this: Where there is competent independent evi-

dence in the record which supports the judgment without recourse to the testimony erroneously admitted, generally the error is not prejudicial as it will be presumed on appeal that the trial judge considered and relied upon the competent evidence in making his findings and rendering the judgment. *Evans v. Gibson*, 220 Cal. 476, 31 P.2d 389; *Roy v. Salisbury*, 21 Cal.2d 176, 130 P.2d 706; *Frazure v. Fitzpatrick*, 21 Cal.2d 851, 136 P.2d 566; *Ford v. Lou Kum Shu*, [26 Cal.App. 203, 146 P. 199] *supra*; *Watt v. Copeland*, 92 Cal.App. 161, 267 P. 928; *Cordi v. Garcia*, 56 Cal.App.2d 584, 132 P.2d 887."

See also *Jaffe v. Vitz*, 84 Cal.App.2d 810, 813, 191 P.2d 802; *Bisno v. Herzberg*, 75 Cal.App.2d 235, 241, 170 P.2d 973; *Brock v. Fouchy*, 76 Cal.App.2d 363, 371, 172 P.2d 945; *Lincoln v. Averill*, 47 Cal.App. 2d 335, 337-338, 117 P.2d 913; and *Southern California Jockey Club v. California Horse Racing Bd.*, 36 Cal.2d 167, 176, 223 P.2d 1, wherein it is said that it is presumed on appeal that the court did not base its finding on irrelevant evidence where there is competent evidence to support it.

Appellant next contends that the court below erred in failing to give due regard to the necessity of corroboration of the testimony of the plaintiff upon which the alleged charge of cruelty was based; and also committed error in pronouncing that the appellant had failed to corroborate her testimony on her cross-complaint for separate maintenance.

[6, 7] As to the first of these two contentions plaintiff testified that defendant argued with him continuously; that she sometimes resorted to vulgarity and called him a son-of-a-bitch. This testimony is sufficiently corroborated by that of several witnesses. As was said in *McGann v. McGann*, 82 Cal.App.2d 382, 386-387, 186 P.2d 424, 427:

"The extent of the corroboration necessary for the granting of a decree of divorce is not defined in any of our statutes. It is not necessary to corroborate all of the acts of cruelty charged by the party to whom the de-

cre is granted. Where a number of charges of cruelty have been made, corroboration of a single act of cruelty may be sufficient. *Ungemach v. Ungemach*, 61 Cal.App.2d 29, 142 P.2d 99; *Keener v. Keener*, supra, (18 Cal.2d 445, 116 P.2d 1). Moreover, the rule requiring corroboration is not so strictly applied in hotly contested divorce actions as it is in actions where a decree is demanded upon the default of the opposing party. The principal object of the corroboration rule is to prevent collusion between the parties, and where it is clear from the evidence in a contested action that there is no collusion the court is justified in granting the decree upon evidence which is only slightly corroborated if otherwise the court is satisfied that the prevailing party is entitled to a decree. *Minnich v. Minnich*, 127 Cal.App. 1, 15 P.2d 804; *Ungemach v. Ungemach*, supra.’”

The contention that the trial court committed error in pronouncing that appellant had failed to corroborate her action for separate maintenance is not supported by the record. It is true that the original findings did contain the following language: “That defendant has failed to produce sufficient corroborated evidence to establish a cause of action for divorce.” However, the court, in passing upon the motion for a new trial, stated that he did not base his decision on the separate maintenance action upon the ground of lack of corroboration; that he was not satisfied with the testimony offered in that action and that the weight of the evidence was against the contentions of appellant. The court then analyzed portions of the evidence given by appellant and her witnesses and declared that he did not believe the charges made. The court then prepared, signed and filed an order under and pursuant to Section 662 of the Code of Civil Procedure changing the original finding in this connection to read as follows: “That defendant has failed to establish a cause of action for separate maintenance or divorce,” eliminating the finding originally made.

Appellant argued at the motion for a new trial that she had established recrimination and although this matter had not been pleaded by her, claimed that the court should have made a finding thereon. The court then added the following finding: “That it is not true that plaintiff has been guilty of any acts or conduct which constitute recrimination.”

If the trial court erroneously indicated in his original findings that the law required corroboration in a separate maintenance action, it was his duty to, and he did reconsider the evidence in the light of the correct rule and make correct findings. *Spier v. Lang*, 4 Cal.2d 711, 714, 53 P.2d 138.

[8] Appellant next argues that, assuming that the court justifies the decision rendered on the basis of the use of abusive language, that upon a consideration of the entire record, the decision cannot be supported by legal precedent. In view of the entire relevant testimony introduced at the trial, we cannot here assume that the judgment herein was based on the sole ground that defendant used abusive language. This was but one of the findings relative to the conduct of defendant. In this connection it is argued that the conduct of defendant could not have constituted cruelty under the facts presented. This contention is without merit and as was said by this court in *Speers v. Speers*, 105 Cal.App. 254, 255-256, 287 P. 138:

“No appellate court may gauge or measure the degree of susceptibility of a party in a divorce proceeding to a course of cruel conduct on the part of the other spouse. That which may be infinitely cruel to a person of intelligence, delicacy of sentiment, and innate refinement may not be cruel to a person lacking in these estimable qualities. The trial judge, sounding his judgment on the conduct of the parties, their apparent manner of living, the degree of their refinement, and the scope of their intelligence is in a position to determine if a given course of conduct by one party will result in extreme cruelty to the other.”

The infliction of grievous mental suffering is a question of fact to be decided from the circumstances of each case in the light of the intelligence, refinement and delicacy of sentiment of the complaining party. A correct decision must depend upon the sound sense and judgment of the trial court and its conclusion will not be disturbed unless the evidence is so slight as to indicate an abuse of discretion. *Lawrie v. Lawrie*, 110 Cal.App.2d 380, 384, 242 P.2d 920. We cannot here say that the trial judge who is vested with great latitude in determining the weight and sufficiency of all the evidence presented, and who was in the best position to judge the credibility and determine the motives of the witnesses abused his discretion in the instant case in determining that the conduct of appellant constituted extreme cruelty and inflicted grievous mental suffering upon the plaintiff.

[9] We are requested to consider certain "press pronouncements" as evidence of plaintiff's activities since the commencement of the trial of this action. Such evidence is cumulative and would only result in additional conflict and where, as here, such evidence would not compel a reversal of the judgment, the request must be denied. In *re Estate of Schluttig*, 36 Cal.2d 416, 422, 224 P.2d 695.

Finally, appellant contends that the trial court's decision was aimed at placing the appellant in a "position of quandary as to whether she would lose certain basic rights in the event that she sought to appeal from the judgment rendered." The evidence shows that plaintiff executed an instrument of trust on June 8, 1934. This instrument provides that the trust shall terminate in 1954, at which time the corpus is to be delivered to plaintiff Fred H. Bixby, Jr., if he is then living, and in the event that he should die prior to the expiration of said period the whole thereof is to be distributed to his heirs at law in accordance with the laws of the State of California then in effect. This trust agreement has been the subject of scrutiny and interpretation in *Bixby v. Hotchkis*, 58 Cal.App.2d 445, 136 P.2d 597 and *Bixby v. California Trust Co.*, 33 Cal.2d 495, 202 P.2d 1018. The trial

court herein found that plaintiff's interests and rights in and under the trust is his sole and separate property and defendant has no interest in the same as such. It was further found that should plaintiff die before the entry of the final decree herein, defendant would step in as an heir and that there exists, therefore, an expectancy on the part of the defendant. The judgment herein provides that if the defendant shall within thirty days from the entry of the interlocutory decree file a waiver and a release agreement as therein set forth that then, and only in that event, and not otherwise, defendant shall have and recover of and from plaintiff the sum of \$15,000 in compensation for the expectancy.

[10-12] The finding that the plaintiff's interest in the trust was his separate property is sustained by the evidence. However, as was said in *Fox v. Fox*, 18 Cal.2d 645, 646, 117 P.2d 325:

"In an action for divorce, only the community property and the homestead may be awarded; the court is not authorized to assign the separate property of one of the spouses to the other, nor to require one to pay to the other any amount in lieu of an assignment or division of it. *Conard v. Conard*, 5 Cal.App.2d 91, 41 P.2d 968."

Appellant is not prejudiced and cannot complain where, as here, she obtained more than that to which she was entitled. *John-drow v. Thomas*, 31 Cal.2d 202, 206, 187 P.2d 681; *Pepin v. Stricklin*, 114 Cal.App. 32, 35, 299 P. 557.

[13,14] Plaintiff filed a motion to dismiss the appeal herein and affirm the judgment on the ground that the appellant had accepted the benefits of the judgment and was barred from attacking it. The record shows that during the trial defendant testified that she was in need of certain dental work which would cost approximately \$2,500. Whereupon, counsel for plaintiff stated that his client would pay "any reasonable bill for any medical or dental services needed by Mrs. Bixby, gladly, without an order of court, in any reasonable amount" and asked the court to make an appointment for Mrs. Bixby with a dentist. The court then discussed the matter with a

dentist and awarded defendant the sum of \$1,500 for such work. On June 9, 1952, plaintiff paid this amount by check, which, when filed herein, indicated that certain typewritten words in the lefthand corner thereof had been crossed out. Plaintiff claimed that the check had been altered and defendant claimed that it was in the same condition when she received and cashed it as it now is. While it is true, as argued by plaintiff, that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution to an appeal therefrom, the rule has no application when the benefits accepted are such that appellant is admittedly entitled to them or would not be affected or put in jeopardy by the appeal. *Schubert v. Reich*, 36 Cal.2d 298, 300, 223 P.2d 242. We are of the opinion that under the circumstances shown by the record before us the plaintiff's motion to dismiss the appeal must be denied.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, J., dissenting.



120 Cal.App.2d 524

PEOPLE v. WILSON.
Cr. 5017.

District Court of Appeal, Second District,
Division 1, California.
Oct. 1, 1953.

Defendant was convicted of robbery. The Superior Court, Los Angeles County, Kenneth C. Newell, J., entered judgment and denied defendant's motion for new trial and defendant appealed. The Court of Appeal, White, P. J., held that conflict in evidence concerning free and voluntary nature of confession presented a question of credibility and evidence justified admission of confession and refusal to strike it from the record.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law §517(1)

A confession may not be used against an accused unless the prosecution can show its free and voluntary character and that it was made without previous inducement, duress or intimidation.

2. Criminal Law §260(11)

Where jury was waived, credibility of witnesses was a matter for the court's determination.

3. Criminal Law §1153(6)

Upon appeal, correctness of trial court's conclusion as to whether confession was or was not voluntarily made is to be determined in the light of the discretion vested in the arbiter of facts and reversal is not authorized unless abuse of discretion is established.

4. Criminal Law §531(3)

In prosecution for robbery, conflict in evidence as to free and voluntary nature of confession presented a question of credibility and evidence justified admission of confession and refusal to strike it from the record.

Max Tendler and William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was accused of the crime of robbery. Following the entry of a plea of not guilty it was stipulated that the cause might be submitted on the transcript of the testimony taken at the preliminary examination, with the introduction of additional evidence.

After reading the aforesaid transcript and reviewing such further evidence, the court adjudged defendant guilty of the offense charged against him, found the same to be robbery of the first degree and that defendant was armed with, but not in personal possession, of a dangerous weapon at the time of the commission of the offense. Motion for a new trial was de-

nied and defendant was referred to the California Youth Authority.

From the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

An epitome of the factual background surrounding this prosecution, as revealed by the record, shows that about 8:50 o'clock on the night of July 23, 1953, Joseph Owens and his wife Marguerite were in a liquor store which they owned and operated in the city of Monrovia. Three young men walked into the store in single file. Two of them went back to the cash register and the other "stayed right at the door leaning against the door frame". As they walked in, one of them, who pointed a gun at Mr. Owens, said, "This is it." They tried to get into the cash register, but when they could not open it, they demanded that Mr. Owens do so, which he did. They took the money out of the cash drawer in the register; one of them told the Owens to stay where they were and not make any noise and they wouldn't get hurt; and then the three young men walked out of the store in single file. All three of the young men wore dark glasses and gloves, two of them had on blue jackets, and one of them had on a light shirt. After they left, Mr. Owens was short \$86.69 from his cash register. This money was taken from its owners against their will and without their consent, and while they were in fear of the gun pointed at Mr. Owens.

A two-door Pontiac sedan was seen by Officer Goldsberry, of the Arcadia Police Department, going west. The officers drove alongside the car, told the driver to pull over, and he pulled the car into a parking lot. The officers ordered them all out of the car, and the defendant and three other youths, two aged seventeen and one sixteen, got out. In the back of the car on the left-hand side, there was a gun wrapped in a blue jacket; on the back seat was a belt with shells in it; and there were six .38 caliber shells in the pocket of the blue jacket in which the gun was wrapped.

Monrovia Police Officer Blair had several conversations with the defendant about the incident at the Owens' Liquor Store on

July 23. He testified there were no threats, force or violence used on the defendant to induce him to talk, there were no promises of reward or hope of immunity extended to him, and his statements on each occasion were freely and voluntarily made.

The first conversation took place on the morning of July 24, in the office of the Chief of Police in the presence of defendant, Officer Blair, Sergeant Titus of the Glendale Police Department, and another officer. Defendant was asked if he was the driver of the automobile involved in the robbery which had taken place on the previous evening, and the defendant said that he had been the driver of the car, but that he knew nothing of any robbery that had taken place. The defendant was told that the officers had talked with the other three defendants, and had their statements involving him as the driver of the car used by the group. The defendant then said that he might as well tell his story too. He then detailed how he met his three companions on the day in question, stated that he was driving his father's 1947 Pontiac two-door sedan. That the group drove around looking for what "might be a good place to try a robbery". When they arrived at the liquor store here in question, he parked the automobile, his three companions got out of the car and told defendant that if they were gone over twenty minutes, and if there was any shooting, he was to leave without them; that he did not know anything of what ensued until the other three returned to the car and told him to "get going"; that he had a little trouble getting his car started, but after they did start it they drove around until they arrived at Huntington Drive, where they drove west until they were stopped by the police; and that when they saw the police car behind them, Hurley passed the gun to the rear seat.

The second conversation took place on the afternoon of July 24, in the matron's room at the city jail. Present were the defendant and his companions on the preceding evening, namely Hurley, Hill and Miller, together with Officers Blair and Alexander. Officer Blair asked defendant if he had worn the gloves or glasses, to which

he replied in the negative stating that these articles were worn by his three associates.

As a witness in his own behalf, defendant testified he was a truck driver, 19 years of age, residing with his parents in the city of Glendale. After detailing his activities during the afternoon of the day in question, defendant testified that he left home after dinner at about 6:15 P.M.; he went to Hill's house, where he met the latter together with Hurley and Miller; they drove around Glendale and finally determined to drive to Duarte; Hurley was directing defendant's driving as they went east on Colorado Boulevard toward Duarte; they stopped at a service station, purchased some gas and then drove out Colorado Boulevard some distance. Hurley then directed defendant on to Foothill Boulevard; as they were driving along the latter boulevard, Hurley told defendant to stop as he wanted to get some cigarettes; they were almost at the end of a block, so he pulled around the corner and parked. There was a market on Foothill, and the defendant said that he would go with them to get the cigarettes; the others said that they would get him some cigarettes and he could wait in the car. He agreed and they left. The motor of the car was turned off. The other three came back to the car in a hurry and said, "Come on, man, let's go, let's go."; he had a hard time starting the car, but eventually did so, and drove down the street he was parked on, "turned around some blocks," and got on Colorado again. He had not noticed a liquor store in the vicinity of where he parked; only a market. After he had driven along Colorado for about eight blocks an officer in a patrol car motioned him to pull over, so he pulled into a parking lot, where he got out of the car. The patrolman came to the side of the car and told them to line up facing a brick wall. While defendant was there the policeman looked in the car, and defendant turned around and saw him pick up a blue suede jacket, and saw the gun fall out of it. That he had never seen the gun before. The four in the car were taken to jail, and the defendant and Miller were put in a room together. Defendant testified he tried to find out what was the matter, but

Miller wouldn't say anything. Defendant was moved to another cell, where he spent the night, and the next day was taken to another jail, where he and Miller talked; Miller "told him everything". Afterwards the defendant was taken to a room where Sergeant Blair and two other detectives asked him to tell them what had happened. Defendant testified he told them about his activities on the previous evening, and told them that he hadn't known anything about the robbery until Miller told him. When he was through Sergeant Blair and one of the Glendale detectives said that he was lying. The Glendale detective said, "All of the other three have signed statements that you knew everything about it." He said, "Sergeant Blair is your friend." "You are eighteen." "You can be tried in the Juvenile Court." "That would go easier than if you are tried in an Adult Court." "If you don't play along with us, we can get you from five to ten years in Quentin."

After the detective said that he would help him if he "played along", the defendant told him that he "knew everything". But that in fact, he had previously learned from Miller what had happened, and he told the officers about it, stating that he had known that they were going to "pull" the robbery. Defendant testified that he did not tell Officer Blair that he met Hill and Hurley at about 3:00 o'clock on the afternoon of the 23rd, and it would not have been true; he did not tell him that he had seen a gun in the afternoon; but he did tell him that he had pulled up in front of a liquor store which he thought might be a good place to try a robbery, but that there were too many people there, because he was trying to make his story sound good, but it was not true. He did not tell Officer Blair that when he stopped and the other three got out they told him that if they were gone over 20 minutes, and if there was any shooting, he was to leave without them. He had not seen the belt or the bullets which were found in the car until the preliminary hearing. He had never seen the gloves before, and Hurley wore a pair of dark glasses on the night of the 23rd. Defendant testified that he had not intended to engage in a robbery, or aid or abet anyone in a robbery, or

help or conceal anyone after a robbery was committed.

Several witnesses testified that defendant's general reputation in the community in which he lived, "as being an honest law-abiding citizen", was very good.

In rebuttal, Officer Blair testified that at no time in his presence were any promises made to defendant such as that his case would be filed in Juvenile Court, or that he would get probation; that never in the officer's presence were any threats made to defendant concerning the term of imprisonment he would receive, or what would be done with him if he confessed complicity in the robbery; that no statements were made as to the difference between the penalty imposed in a case handled in the juvenile court and that imposed in a felony prosecution in the superior court.

The sole contention made on this appeal is that the court erred prejudicially in denying appellant's motion, made at the conclusion of the trial, to strike from the record the testimony of Officer Blair concerning the incriminatory "admissions and confessions of the defendant insofar as they may be deemed to be admissions or confessions on the ground that they came within the provisions which preclude a court from considering * * * confessions * * * that are not given freely and voluntarily, without promises and without hope of reward".

[1] The law on the subject of confessions has been very definitely settled; the difficulties lie in its application to particular cases. It is a fundamental rule of criminal law that a confession may not be used against an accused unless the prosecution can show its free and voluntary character; that it was made *without previous inducement* and that neither duress nor intimidation caused the defendant to furnish such evidence against himself.

In the instant case, Officer Blair testified that he had several conversations with appellant concerning the robbery in question and that at no time were any threats, force or violence used on him to induce him to talk, nor was any promise of reward or hope of immunity held out to him, and that

his statements on each occasion were freely and voluntarily made.

Thereupon, the attorney for appellant conducted a *voir dire* examination of Officer Blair in which the time, place and parties present at the conversations were established. We do not deem it necessary to set forth in detail the questions asked and answers given during this examination. Suffice it to say, that after several interrogatories were propounded as to promises made or hope of reward extended to appellant, the officer was asked, "And that if he played along with you you would see that he would be certified" (to the Juvenile Court), to which the officer replied, "I have answered that question, we did not make him any promises, there were no promises made to this defendant".

[2-4] In determining the admissibility of appellant's statements to the officer the trial court was confronted with the question of credibility of the respective witnesses, viz., Officer Blair and appellant, as to the presence or absence of hopes of reward or immunity as an inducement to appellant to confess his complicity in the crime charged. The court chose to believe the officer rather than appellant as to the circumstances surrounding the occasions upon which appellant made the inculpatory statements. It is elementary that the credibility of the witnesses was, in this case where a jury was waived, a matter for the court's determination. Upon appeal, the correctness of the trial court's conclusions as to whether the confession was or was not voluntarily made, is to be determined by the appellate tribunal in the light of the discretion vested in the arbiter of the facts. And a reversal is not authorized unless an abuse of discretion has been established by the appellant. In the case now engaging our attention, the evidence as to the confession was in conflict, but there is substantial testimony in the record to show that the confession was freely and voluntarily made. The conflict in the evidence presented a question of credibility, and it was for the trial court to determine whether the confession was freely and voluntarily made and whether it was or was not true. It follows that the trial court did not err in

admitting the confession in evidence, and it being properly admitted, there was no error in refusing to strike it out. *People v. Gerbel*, 71 Cal.App.2d 325, 331, 332, 162 P.2d 946; *People v. Bateman*, 80 Cal.App. 151, 156, 157, 251 P. 335.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN, J., and ROBERT H. SCOTT, J. pro tem., concur.



120 Cal.App.2d 427

FEDELE v. DOWLING.

Civ. 4811.

District Court of Appeal,
Fourth District, California.
Sept. 28, 1953.

Action by seller against buyer for breach of agreement to purchase seller's interest in a business. The Superior Court, San Diego County, Dean Sherry, J., rendered judgment for seller for \$8,770 plus interest and buyer appealed. The District Court of Appeal, Griffin, Acting P. J., held that evidence supported the judgment.

Judgment affirmed.

See also 254 P.2d 605.

1. Evidence ⇨442(6)

Where buyer and seller of interest in business did not intend the execution of various writings to be a complete and final statement of the whole transaction, admission of parol evidence was proper in determining what was the ultimate agreement between the parties.

2. Evidence ⇨441(1)

The exclusionary aspect of the parol evidence rule comes into operation when the parties have adopted a writing or writings as a single, final and complete expression of their understanding and it is where there has been an integration whereby all

prior and contemporaneous negotiations are superseded by the writing or writings that the parol evidence rule is applicable.

3. Sales ⇨383

In action by seller against buyer for breach of agreement to purchase seller's interest in business, evidence sustained finding that purchase price was \$8,000.

4. Sales ⇨382

In action by seller against purchaser for breach of agreement to purchase seller's interest in business, admission of exhibit showing that purchaser assumed and agreed to pay encumbrances upon equipment used in business and of other evidence pertaining to the exhibit was proper as bearing on question of intent of parties as to whether buyer should pay balance due on contract for original sale to seller of equipment in addition to paying the full purchase price.

5. Sales ⇨383

In action by seller against buyer for breach of agreement to purchase seller's interest in business, evidence supported ultimate findings in which court made no mention of credit on purchase price for buyer's payment of balance due on contract for original sale to seller of equipment used in business but in which court did specify allowable credits and found an amount due which, in effect, disallowed such credit.

6. Sales ⇨384(1)

In action by seller against buyer for breach of agreement to purchase seller's interest in business, evidence supported judgment for \$8,770 plus interest in favor of seller.

7. Sales ⇨195

Fact that there was a sales tax due from sale to buyer of equipment used in business was no justification for failure of buyer to pay purchase price under agreement to purchase seller's interest in a certain business.

Woodrow Wilson, Los Angeles, for appellant.

Johnson and Johnson, San Diego, for respondent.

GRIFFIN, Acting Presiding Justice.

Plaintiff's original complaint sought judgment for \$8,533, plus interest against defendant and appellant for breach of an oral agreement to purchase plaintiff's interest in the D. G. Granite Business owned by plaintiff and Paul E. Burton. Defendant answered and claimed that the agreement was in writing and according to its interpretation the sale was made upon different terms from those alleged in the complaint.

During the course of trial the court suggested that plaintiff amend his complaint to conform to the proof. The amendment was made where in one cause of action plaintiff sought to recover \$8,000 on the breach of a claimed oral agreement to sell. In a second cause of action he sought to recover \$1,100, claimed to be due for unpaid labor claims payable under some oral agreement, which agreement was confirmed by a written agreement. In a third cause of action plaintiff claimed there was a written agreement by defendant to pay \$7,500, less the amount of certain repair bills agreed upon, for the interest in the business, as well as \$1,100 wages which the parties agreed were due. The fourth cause of action was for \$8,000, excluding the repair bills and wage claims, predicated upon a contract entered into by mutual mistake, in which reformation of the contract is sought. In a fifth cause of action declaratory relief is sought declaring the respective rights of the parties. Copies of the writings are attached to the amended complaint.

After plaintiff rested and during the production of defendant's evidence, defendant sought to have his answer amended to show claimed fraud and misrepresentation on the part of the plaintiff relating to the amount of the repair bills. The motion was granted but it does not appear that such an amendment was filed. The court entered judgment for \$8,770 plus interest, and defendant appealed.

The evidence shows that plaintiff and Burton were copartners doing a granite business under the name of Hilldale Trucking Company upon property leased from one Kelly Yount.

The granite company owned certain equipment used in the business which was

subject to certain purchase liens amounting to \$2,867. Plaintiff decided to sell his interest in the business in which he claimed he had an \$8,000 investment. It is plaintiff's testimony that early in August, 1951, in response to an ad, defendant orally agreed and arranged to purchase the interest of plaintiff for \$8,000, but defendant did not appear at the escrow office the next day; that about two weeks later the parties again met in an attorney's office with Mr. Yount and the deal was outlined. On August 18, 1951, defendant, Burton, Yount and others met at the partnership office and defendant presented a typewritten proposal (Exhibit B) which he had prepared and in which it is stated: "I propose to buy the D. G. Business * * *" on certain conditions, one, to place \$100 in escrow; two, defendant to take possession on August 20, and Burton to give clear title to equipment (listing it). Then follows a notation written in green ink: "Title to pass at once." Then follows a sentence: "Including repair bills past and to put in running condition", with a line drawn through this sentence with green ink. Then follows the typed statement: "I will pay * * * Fedeli \$7500.00 less that amount of money necessary to clear the above equipment including the current and past repair bills. * * * Mr. Yount will furnish me a lease, immediately, on the entire set-up, Mr. Burton having signed off his lease to Mr. Yount." The lease was to run for five years at \$500 per month, starting September 1, 1951, with an option to purchase, Yount to underwrite the operation to the extent that if the business did not show a net profit of \$1,500 per month for the first six months Yount was to give one year free rent. This exhibit is signed by Yount and Burton and contains some pencil notations which the several parties endeavored orally to interpret to the court, but they did not agree upon their meaning.

At the same time Burton and Yount signed a receipt written in green ink and prepared by defendant, reciting: "Received from * * * Dowling * * * \$100.-00 which is deposit * * * for the purchase of D. P. Granite Business * * * and to include lease on entire Hilldale

Granite Pit * * * Deal as per copy attached. Possession as of close of business 8/18/51." Then on a separate paper, written and signed by defendant (Exhibit 3) he recites: "In connection with purchase of D. P. Granite Business from Paul Burton I agree to pay bal. due on" the described equipment, and "wages due" to certain named individuals "when title to above equipment passes into my hands. Wages not to exceed \$1100.00."

Plaintiff's evidence shows that defendant, at the time of the signing of these documents, orally agreed to pay the \$7,500, plus \$500, which was the amount then shown to have been paid by plaintiff to Burton, totaling \$8,000, which sum plaintiff claimed he had invested in the business. The evidence further shows that defendant, in addition, was to pay the repair bills and labor claims indicated. It is claimed by plaintiff that Exhibit 3 was executed when the defendant orally agreed to pay additional money over and above that proposed in Exhibit B.

Defendant offered in evidence a typewritten copy of his proposal (Exhibit C) on which the deposit figure of \$100 had been changed to "\$4000". The notation "title to pass at once" was not inserted on it. No green ink line had been drawn through the sentence pertaining to repair bills as above indicated in Exhibit B, but a black ink line struck out the line: "less that amount of money necessary to clear the above equipment including the current and past repair bills". It is defendant's position that this writing, without the modifications, was the ultimate contract agreed upon; that the \$4,000 escrow deposit was to include the repair and labor items, and that any claimed balance due included payments due on equipment and that the total due under the contract amounted to no more than \$3,802.-39, payable when clear title was furnished to defendant.

It appears that defendant took possession of the business the day following the agreement entered into on August 13th, and was furnished a lease by Yount; that he continued to operate the business; that he did not pay the \$1,100 labor claim agreed upon; that plaintiff was compelled to pay

this amount for defendant; that defendant did pay \$2,867 liens on the equipment and then immediately sold and disposed of a major portion of it and repurchased other equipment. Apparently there was a claimed violation of the lease from Yount to defendant on the part of defendant. No money was paid on it under the claim that defendant had not realized \$1,500 per month net profit from the business, or that defendant exercised the option to purchase the property under its terms. Yount padlocked the premises. Defendant brought an action against him for specific performance and obtained a temporary restraining order. That action is still pending.

It appears that the State Board of Equalization made a claim for sales tax on the transaction, for \$2,273.22. A balance due of \$300 on a U. S. Government lien was paid by plaintiff during the course of trial. Defendant has paid nothing further to plaintiff since taking possession of the property and continually refuses to pay. This action followed. After trial the court found generally in favor of plaintiff's interpretation of the oral agreement, as supported in part by the writings in evidence.

It was stipulated that the State of California, in behalf of the Director of Employment, would have a lien of \$326.78 upon any judgment recovered by plaintiff. It was further ordered that the lien of the State Board of Equalization be paid by plaintiff, and if paid by defendant he would be entitled to a credit for said amount.

[1,2] Predicated upon the court's oral opinion set forth in the transcript, it considered the complaint as one cause of action and concluded that the written documents in evidence contained extrinsic ambiguities, were sufficiently uncertain to leave the intention of the parties in doubt, and were of such a nature as not to constitute the entire agreement between the parties, and accordingly it accepted the oral agreement established by the evidence and allowed the writings in evidence to assist it in determining what the ultimate agreement between the parties was when defendant took possession of the property.

From a reading of the instruments it does appear that the ruling of the trial court

in this respect was justified, and it is apparent that the parties did not intend the execution of the various writings to be a complete and final statement of the whole transaction.

Defendant's argument that the court improperly permitted parol evidence to vary the terms of a written agreement is without merit. The exclusionary aspect of the parol evidence rule comes into operation when the parties have adopted a writing or writings as a single, final and complete expression of their understanding. It is where there has been an integration whereby all prior and contemporaneous negotiations are superseded by the writing or writings that the parol evidence rule is applicable. In *re Estate of Gaines*, 15 Cal.2d 255, 100 P.2d 1055; Section 1856, C.C. P.; *Morgan v. Green*, 86 Cal.App. 216, 260 P. 596; *Laughlin v. Haberfelde*, 72 Cal.App.2d 780, 165 P.2d 544; 4 Cal.Jur. 10-Yr. Supp. 146, Sec. 192; 6 Cal.Jur. p. 227, Sec. 150; *George Herz & Co. v. Solt*, 23 Cal.App.2d 178, 72 P.2d 251; *Wittherow v. United American Ins. Co.*, 101 Cal. App. 334, 281 P. 668; *Wakefield v. Wakefield*, 37 Cal.App.2d 648, 99 P.2d 1105; *Symonds v. Sherman*, 219 Cal. 249, 26 P.2d 293.

[3] Defendant next contends the purchase price should be \$7,500 instead of \$8,000. Plaintiff testified he had \$8,000 in the business and wanted to have that amount returned to him and so informed defendant. His testimony is corroborated by other witnesses. Defendant fixed the price of \$7,500 in the writing, and admits there was a conversation about an extra \$500 he had overlooked, but stated this \$500 was to be discussed at some other time and that he never expressly agreed to pay that additional amount. However, he did state that he agreed that "it was possible" he said when the deal got into its final form he would change the \$7,500 to \$8,000. The finding of the trial court in this respect is fully supported.

[4] The next argument is that the trial court erred in failing to allow as a credit on the purchase price the payment of the sum of \$2,867 made by defendant, being the balance due on the contract for the sale of

the equipment to plaintiff. Plaintiff's Exhibit 1 clearly indicates that this amount, as well as the past repair bills, were to be deducted from the \$7,500 purchase price. The writings are confusing as to whether this amount was to be allowed as a reduction of the purchase price or whether defendant was to pay this item in addition to it. According to the oral decision of the trial judge it was called to his attention that it was stipulated that this item had been paid by the defendant and it was argued that the defendant should be allowed this credit on the judgment for the purchase price. Apparently the oral decision did not dispose of this issue. There was oral testimony to the effect that defendant was to pay any indebtedness due on the equipment over and above the sum agreed to be paid to plaintiff upon the contract price, including the labor claim. The agreement dated August 18, 1951 (Exhibit 3) signed by defendant, specifically states: "I agree to pay bal. due on" the equipment. There is nothing there indicating that said payment should be allowed as payment on the purchase price of the granite business. Apparently, in the ultimate signed findings, the court made no mention of this particular credit but did specify the credits it did allow, and found an amount due which in effect disallowed this item as a credit. The fact that the trial court intentionally disallowed this item as a credit and believed that the oral agreement did not provide for such a credit is strengthened by the reasoning expressed in the oral opinion regarding the testimony surrounding the proposed written agreement (Exhibit 5) which was prepared on September 5, 1951, and signed by Fedele and Burton in an attempt to settle the differences existing between the parties.

The evidence in this respect is that on September 22, the attorney for plaintiff phoned defendant and discussed with him possible terms that could be agreed upon; that he suggested to defendant a \$2,000 down payment, plus the labor claims agreed upon, totaling about \$1,000 and payments of \$300 per month for six months and thereafter \$500 per month until a total of \$9,031 was paid; that defendant stated he was agreeable to that arrangement but wanted

some protection with reference to possible creditors; that he suggested to defendant that the granite company's accounts receivable be held in trust for this purpose and the company would also post a bond to this effect; that this provision was also acceptable to him and to draw up an agreement to this effect. Such an agreement was drawn and it also contained a provision that defendant "assumes and agrees to pay all encumbrances upon the rolling equipment hereinbefore mentioned".

The following day, in the presence of Yount, Fedele and others, Dowling read the proposed agreement and, according to the witnesses, said: "I have no doubt that this is the deal, but I was supposed to have a period of time of 60 days or something like that within which to raise the down payment. I don't have it at this time. I have a business in escrow that hasn't closed yet and I need more time"; that he was asked if the terms of the agreement were satisfactory and he said that they were; that Dowling refused to sign it for the reasons stated by him and not because of any added provision regarding the payment of encumbrances.

Defendant was examined in connection with this conversation and his answers were quite evasive. He claimed he did not recall the statements made by him but he would not deny making the statement as to a new arrangement to pay \$3,000 down and \$300 per month for the first six months and \$500 per month thereafter. He admitted seeing the proposed agreement (Exhibit 5); that they discussed the terms but he did not remember what they were; and that he "thoroughly understood that Mr. Fedele wanted \$8000 out of the business".

[5, 6] The exhibit and the evidence pertaining to it were properly received and considered as evidence bearing on the question of the intent of the parties. Accordingly, there is evidence that would support the ultimate findings, which are controlling, Colver v. W. B. Scarborough Co., 73 Cal.App. 421, 434, 238 P. 1096, and support the judgment in the full amount allowed. A motion for new trial was fully argued and no doubt this claimed error was or should have been presented to the trial

court for correction if it so intended. The motion was denied and we must assume that the court did not intend to allow this item as a credit although the evidence might have supported a contrary version.

[7] The last argument is that defendant was justified in failing to pay the purchase price under his agreement because plaintiff did not furnish clear title to the equipment in that there was a sales tax due from the sale of the equipment to defendant. There is no merit to this argument. Defendant did obtain the title to the equipment and in fact sold it. Plaintiff states that if defendant had paid any portion of the purchase money agreed upon he would have been able to pay the tax due from the sale of the equipment.

No error appears in the allowed amendment to plaintiff's complaint and it does not appear that defendant was "denied due process of law", as indicated in his brief. *Peters v. Binnard*, 219 Cal. 141, 25 P.2d 834; *Klopstock v. Superior Court*, 17 Cal. 2d 13, 108 P.2d 906, 135 A.L.R. 318.

Judgment affirmed.

MUSSELL, J., concurs.



120 Cal.App.2d 521

WILKMAN et al. v. BANKS et al.

Civ. 19874.

District Court of Appeal, Second District,
Division 1, California.

Oct. 1, 1953.

Action to enjoin defendants from operating a sanitarium on their property in violation of deed restrictions of record. The Superior Court of Los Angeles County, William R. Gallagher, J., entered judgment granting an injunction, and defendants appealed and petitioned for a writ of supersedeas to stay enforcement of judgment pending appeal. The District Court of Appeal held that defendants were entitled to writ of super-

sedes since they would suffer irreparable damage in their business and lose the fruits of a favorable determination on appeal if they should be precluded in the meantime from continuing in their business of operating a sanitarium.

Writ of supersedeas granted.

1. Appeal and Error ⇨460(2)

Injunction ⇨4

A prohibitory injunction is self-executing and its operation is not stayed by an appeal.

2. Appeal and Error ⇨477

District Court of Appeal has inherent power to issue a writ of supersedeas if such action is necessary or proper to the complete exercise of appellate jurisdiction.

3. Appeal and Error ⇨478

The test of whether appellate jurisdiction will be safeguarded by issuance of writ of supersedeas is based upon a consideration of the respective rights of the litigants, which contemplates the possibility of affirmance as well as of reversal.

4. Appeal and Error ⇨484

The purpose of writ of supersedeas is to maintain the subject of action in status quo until final determination of appeal, in order that appellant may not lose the fruits of a meritorious appeal.

5. Appeal and Error ⇨479(1)

Defendants were entitled to writ of supersedeas suspending pending appeal enforcement of judgment enjoining defendants from conducting a hospital or sanitarium on described realty in violation of deed restrictions of record, since defendants would suffer irreparable damage in their business and would lose the fruits of a favorable determination on appeal if they should be precluded in the meantime from continuing in their business of operating a sanitarium, whereas permitting defendants to continue their business pending appeal would not result in further detriment to plaintiffs or leave them with an empty victory. Rules on Appeal, rule 49.

PER CURIAM.

Defendants have petitioned for a writ of supersedeas under Rule 49, Rules on Appeal (36 Cal.2d 37) to stay proceedings under an adverse judgment, pending determination of their appeal therefrom. The action filed in the superior court, being case 602619, alleged violation by defendants of certain deed restrictions of record by maintaining and operating a sanitarium on defendants' property, and prayed for a prohibitory injunction. Defendants interposed equitable defenses of changed conditions in the neighborhood, excessive and disproportionate hardship on defendants, and laches. Judgment was rendered for plaintiffs and was entered on May 26, 1953, enjoining defendants from conducting or permitting others to conduct a hospital or sanitarium on the property described. Notice of appeal was filed July 23, 1953. No opposition to defendants' petition for a writ of supersedeas has been presented to this court by their adversaries, the plaintiffs in the case.

[1-4] A prohibitory injunction is self-executing and its operation is not stayed by the appeal. This court has inherent power to issue a writ of supersedeas if such action is necessary or proper to the complete exercise of its appellate jurisdiction, *Rubin v. American Sportsmen, etc., Soc.*, 102 Cal. App.2d 288, 227 P.2d 303. The test of whether appellate jurisdiction will be safeguarded is based upon a consideration of the respective rights of the litigants, which contemplates the possibility of affirmance as well as of reversal. *Board of Dental Examiners v. Jameson*, 23 Cal.2d 689, 690, 145 P.2d 905. The purpose of the writ of *supersedeas* is to maintain the subject of the action in *status quo* until the final determination of the appeal, in order that the appellant may not lose the fruits of a meritorious appeal. *Dry Cleaners & Dyers Institute v. Reiss*, 5 Cal.2d 306, 310, 54 P.2d 470.

[5] From the nature of the proceedings in the trial court it is apparent that irreparable damage would be done to defendants in their business and that they would lose the fruits of a favorable determination on appeal if they were to be precluded

in the meantime from continuing in their business of operating a sanitarium. There has been no claim interposed by the plaintiffs in the case that they would suffer further detriment or be left with an empty victory if defendants are permitted to continue to carry on their business until the appeal is decided. In this respect the case before us is quite different in its factual aspects from the many cases, such as *Ohaver v. Fenech*, 206 Cal. 118, 273 P. 555, where positive additional harm would have been done by issuance of a writ of supersedeas.

It is ordered that a writ of supersedeas issue suspending enforcement of judgment in the above entitled and numbered action entered on the 26th day of May, 1953, pending final determination of the appeal therefrom.



120 Cal.App.2d 562

PEOPLE v. HOLLIDAY.

Cr. 5009.

District Court of Appeal, Second District,
Division 2, California.

Oct. 5, 1953.

Defendant was convicted of offenses of possession of marijuana and transportation thereof. The Superior Court of Los Angeles County, Jesse J. Frampton, J., entered judgment of conviction and order denying motion for a new trial, and defendant appealed. The District Court of Appeal, Fox, J., held that the evidence warranted inference that, though automobile was driven by another, defendant aided and abetted in transportation of the marijuana and was therefore liable as a principal.

Judgment affirmed.

1. Poisons ☞9

In prosecution for transporting marijuana, evidence justified inference that defendant and driver of automobile were jointly engaged in selling marijuana and that they had joint possession of bag and

marijuana therein found on front seat of automobile. Health and Safety Code, § 11500.

2. Poisons ☞9

In prosecution for transporting marijuana, evidence warranted inference that, though automobile was driven by another, defendant aided and abetted in transportation of the marijuana and was therefore liable as a principal. Penal Code, § 31; Health and Safety Code, § 11500.

3. Poisons ☞4

Possession of narcotics is an offense distinct from transportation thereof, but there can be only one conviction where a single act of transportation is proved and the only act of possession is that incident to the transportation. Health and Safety Code, § 11500.

4. Criminal Law ☞984

Proof of possession of marijuana both before and after transportation thereof and apart from such transportation was sufficient to sustain conviction on separate charges of possession and transportation of marijuana, though the same marijuana was involved in commission of both offenses. Health and Safety Code, § 11500.

5. Criminal Law ☞29

Where separate and distinct acts are proved as the basis of convictions of two distinct offenses, such convictions may be sustained, even though the acts on which each is based were closely connected in time and were part of the same criminal venture.

Bernay, Leader & Bass and William W. Larsen, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

FOX, Justice.

Appellant was charged in count one with transporting marijuana and in count two with possession thereof, each in violation of section 11500, Health and Safety Code. He was convicted on both counts. He appeals from the judgment and the order denying his motion for a new trial.

Appellant does not attack the judgment on count two—possession. He does, however, challenge his conviction on the charge of transportation on the grounds (1) of the insufficiency of the evidence, and (2) that only a single act is here involved yet two separate criminal offenses have been carved out of it. His position is not well founded.

As a result of a previous contact, appellant, who was in a coupe driven by his co-defendant, Kelly, approached Officer Ruskin's car and inquired whether he had the money. Upon receiving an affirmative reply, appellant got out of his car and went back of a near-by building. He returned with a brown paper bag and said, "Here it is." Ruskin examined the contents which was identified by appellant as marijuana, but protested the quality and refused to make the purchase. Appellant returned with the bag to the Kelly car which later stopped in front of a small hotel. Appellant went into the hotel, Kelly remaining at the wheel. Kelly was then arrested, and a bag containing approximately one half pound of marijuana was found on the passenger side of the seat near the door.

Appellant was observed coming out of room 8 and locking the door. He denied living there but upon demand produced one of his personal keys that unlocked the door. The manager of the hotel testified that he rented the room to Kelly under the name Jordan, but he had seen appellant around the hotel about once a week since Kelly had lived there, and had seen him enter the latter's room.

Upon a search of the room, approximately eleven pounds of marijuana were found in various bags and in a trunk which also contained a scales.

[1,2] The circumstances here revealed, viz., the large quantity of marijuana in "Kelly's" room together with the scales, the possession of a key to this room by appellant, and his frequent presence there; the fact that Kelly was driving appellant when Ruskin was first contacted relative to a sale, waited until the abortive transaction was concluded, then drove him back to the hotel where the contraband was stored and stayed in the car while appellant went into

the room with his own key; and that the paper sack of marijuana which had been transported was on the front seat where both Kelly and appellant had been riding, reasonably justified the trial court in drawing the inference that appellant and Kelly were jointly engaged in selling marijuana and that they had joint possession of the bag and its contents found on the front seat of the car. *People v. Graves*, 84 Cal. App.2d 531, 534, 191 P.2d 32; *People v. Bigelow*, 104 Cal.App.2d 380, 389, 231 P.2d 881; *People v. Bassett*, 68 Cal.App.2d 241, 247, 156 P.2d 457. Although Kelly did the driving, appellant aided and abetted in the transportation of the marijuana and was therefore liable as a principal. Penal Code, sec. 31. Here there was more than mere possession. Appellant was carrying the contraband in a moving vehicle. *People v. Coleman*, 100 Cal.App.2d 797, 801, 224 P.2d 837.

[3,4] Appellant seeks to avoid his conviction on the transportation count on the theory that only a single act is charged as a basis for both convictions. Hence, only one conviction can stand even though the offenses are not necessarily included offenses. He relies on *People v. Knowles*, 35 Cal.2d 175, 217 P.2d 1. It is stated in that case, 35 Cal.2d at page 187, 217 P.2d at page 8, that "The possession of narcotics is an offense distinct from the transportation thereof, but there can be only one conviction when a single act of transportation is proved and the only act of possession is that incident to the transportation." Appellant, however, does not come within the protection of these principles because not merely a single but multiple and separate criminal acts are shown and the act of transportation is not incident to possession. Here appellant's conviction of possession can be sustained upon the basis of his possession of marijuana both *before* and *after* the transportation and *apart* from such transportation. It will be recalled that when appellant offered to make a sale of Ruskin he first went back some distance behind a building and returned with his contraband merchandise. This justifies an inference that the marijuana was hidden there and was not brought in the coupe Kelly was

driving. The crime of possession was then established and complete, and no transportation of the commodity had taken place. If the contemplated sale had been effected appellant would not have been involved in transporting his contraband back to the hotel. Even though the sale was not completed, appellant's transportation of the marijuana in the coupe was not incident to his prior possession and attempted sale. It was a separate and independent decision and act on his part. He could have returned it to its former hiding place or thrown it away.

Appellant's conviction of possession could undoubtedly have been justified also on the evidence of the cache found in "Kelly's" room together with the close relationship of these parties as previously noted. This supply, however, was not the subject of transportation on the occasion here in question.

[5] Thus separate and distinct acts have been proved as the basis of each conviction. Such convictions may be sustained even though the acts on which each is based were closely connected in time and were part of the same criminal venture. *People v. Knowles*, supra, 35 Cal.2d at page 188, 217 P.2d at pages 8, 9.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.



120 Cal.App.2d 391

BISHOP v. REID.

No. 15518.

District Court of Appeal, First District,
Division 1, California.

Sept. 28, 1953.

Action for injuries sustained by pedestrian when she was struck, while in a marked pedestrian cross walk, by defendant's automobile, which was engaged at time in mak-

ing a left turn. The Superior Court, City and County of San Francisco, rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Wood, J., held that jury questions had been presented as to negligence of defendant and contributory negligence of plaintiff.

Reversed.

1. Negligence $\hookrightarrow$ 12!(1), 136(14)

Disobedience of statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances; and while a presumption of negligence arises on proof of such a violation, such presumption can be rebutted by evidence of justification or excuse. Vehicle Code, § 560.

2. Automobiles $\hookrightarrow$ 245(6, 72)

In action for injuries sustained by pedestrian when she was struck, while in a marked pedestrian cross walk, by defendant's automobile, which was engaged at time in making a left turn, jury questions were presented as to negligence of defendant and contributory negligence of plaintiff. Vehicle Code, § 560.

Francis N. Foley, San Mateo, for appellant.

Nicholas Zoller, San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendant has appealed from a judgment awarding plaintiff damages for personal injuries sustained by plaintiff when hit by an automobile driven by defendant.

The accident occurred at the intersection of Chestnut and Fillmore Streets, San Francisco. Plaintiff was walking across Fillmore, from the northeast to the northwest corner of the intersection, in a marked pedestrian crosswalk. Defendant, who had been driving in an easterly direction on Chestnut, had just made a left turn and was going north on Fillmore.

The trial court held, as a matter of law, that defendant was negligent and plaintiff not negligent, and so instructed the jury.

[1,2] Defendant claims this holding and instruction erroneous, upon the ground,

asserted by defendant, that there was substantial evidence for the consideration of the jury upon both issues, negligence of the defendant and contributory negligence of the plaintiff. Our examination of the record convinces us there was evidence for the jury on those issues, and that the judgment must be reversed.

There were four witnesses to the accident: plaintiff; defendant; Betty Gauger, who had been driving a car southerly on Fillmore toward Chestnut and had just come to a stop at the northerly crosswalk of this intersection; and Festus J. King, a pedestrian who had walked along this crosswalk from west to east, reaching the northeast curb as plaintiff left it, going in the opposite direction.

The accident happened at 10:40 in the evening of November 20, 1951. There were four lights (not signal lights), one on each corner. Plaintiff testified there was a light rain falling, it had been raining harder earlier and the streets were full of puddles. Defendant said it was raining pretty hard, it was dark, and visibility was poor. King also testified that visibility was poor.

Plaintiff testified that she waited for traffic to clear before starting across; there was no traffic in sight in any direction; she could see back 200 feet on Chestnut, several hundred feet northerly on Fillmore, one block south on Fillmore, and about half a block westerly on Chestnut.

Plaintiff said that after leaving the curb she looked continually west while crossing, watching her footing at the same time; she was facing straight ahead, watching in all four directions for cars but probably did not look in a southerly or northerly direction. She was carrying a cane. This was her first night out after a previous accident. King said that plaintiff had her head inclined toward the ground from the time she left the curb until she arrived at the point of impact.

Plaintiff testified that when she had taken about 10 to 15 steps she saw defendant's car at the west line of the intersection, estimating the speed at 25 to 30 miles per hour; that the car continued on across, coming at a rapid pace without slowing

down or stopping and then made a sudden lefthand turn. When the car was within about 10 feet of plaintiff, she could see it was not going to stop and she put up her hand in which she was carrying an envelope, and screamed. Plaintiff watched the car continually until the time of impact.

Defendant testified that when she was 50 feet from the intersection her car was going about 15 miles per hour; when she reached the intersection, 5 miles per hour. As she approached Fillmore she saw a car [the Gauger car] coming south on Fillmore, approaching Chestnut; that car stopped and defendant then went ahead, the other car remaining stopped until she had passed it. She started to make a left turn about the middle of Fillmore, did not recall if she extended her arm when she reached the intersection or when she started to make the turn. She saw plaintiff for the first time when about 5 feet from her. She caught plaintiff in her headlights as she was going north on Fillmore. Her car lights were on and the windshield wipers were on; she was looking right in front of her; her speed was 5 miles per hour at the time she applied her brakes. She heard plaintiff scream and saw her throw up her arm.

Gauger stopped at the intersection and saw defendant's car stop too. Gauger observed defendant's car from the time it entered the intersection until it made the left turn. It was going approximately 7 or 8 miles per hour. It was going at the same speed when defendant was making the left turn and there was no increase in speed up to the point of impact. Gauger had come to a complete stop at the north line of this crosswalk, her car was then about 15 feet from the accident. She first saw plaintiff when defendant's car hit plaintiff; had not seen plaintiff walking across the intersection. King saw defendant's car as defendant was about ready to execute the left turn; as it was making the turn, the car was going about 10 miles per hour. Plaintiff did not see Gauger's car or any car other than defendant's until after the accident.

Plaintiff testified that when hit by the left front part of defendant's car at about the level of her knees, she was tossed to the left of the car, her body traveling through

the air about 3 to 5 feet and landed on the north line of the crosswalk. She had been walking in the middle of the crosswalk. She fell on her left side, her left shoulder and knee were banged. Defendant said she did not observe plaintiff's body leaving the ground and going through the air; instead, that plaintiff went down on her knees and hit her shoulder. Gauger said that plaintiff was not thrown from the front of the car at all; she went to the left of the car and fell to her knees. Gauger did not see plaintiff fall on her side on the pavement. King said that plaintiff's body was not thrown away from the car, and that when her body came to rest she was in a kneeling position; plaintiff was in contact with the car at the time, she could have touched the car. Defendant said that after the impact plaintiff was right near the left front fender, within 5 or 6 inches of it. When defendant got out of her car, plaintiff was not lying in the street, she was half way up; she was in the crosswalk after the impact.

Plaintiff said that when defendant's car came to rest after the impact it was headed northeasterly, straddling the north line of the crosswalk. Defendant testified that plaintiff, at the time of the impact, was about the middle of the crosswalk, and that the car did not travel after the impact, it stopped at once. Gauger said that at the time of the impact defendant's car came to a complete stop; after the impact there was no movement of defendant's car so far as she knew. King testified that defendant's car proceeded into the crosswalk about $\frac{1}{4}$ or $\frac{1}{2}$ the width of the crosswalk and at the time of the impact had come to a quick, sudden stop.

This evidence which so patently conflicted at so many significant points (visibility, speed of the car, whether or not plaintiff was observing traffic as she walked across, the force of the impact, whether or not plaintiff was thrown several feet, whether or not the car stopped at the point of impact; to mention a few) presented questions of fact, including the credibility of witnesses, for the jury to decide in determining the issues of alleged negligence

of the defendant and alleged contributory negligence of the plaintiff.

It is true that this evidence shows without conflict that plaintiff was hit by defendant's car while plaintiff was crossing within a marked crosswalk, and a statute declares that the "driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, * * *." Vehicle Code, § 560. But that does not mean, under the circumstances of this case, that defendant Reid was negligent or that plaintiff was not negligent as a matter of law. It is "settled that disobedience of a statute for which criminal sanctions are imposed is not negligence as a matter of law under all circumstances, but a presumption of negligence arises on proof of such a violation, and the presumption can be rebutted by evidence of justification or excuse." *Tossman v. Newman*, 37 Cal.2d 522, 525, 233 P.2d 1, 2. See also *Ornales v. Wigger*, 35 Cal.2d 474, 218 P.2d 531, and *Graf v. Garcia*, 117 Cal.App.2d 792, 256 P.2d 995.

Of some evidence in the *Ornales* case, strikingly similar to some of the evidence in our case, the court in that case said: "Defendant testified that she did not see plaintiff, that when she was entering Workman Street 'I saw a parasol go up like that at my window, at the left, and heard a woman scream and I looked; I didn't see anybody so I knew there was nothing in front of me and I was already in the cross street so I was going to stop * * *.' The record shows that the wind was blowing on the night of the accident and that it was raining. This atmospheric condition, together with the fact that plaintiff was dressed in dark clothing and was carrying a black parasol or umbrella could be considered by the jury as evidence to rebut the presumption of negligence arising from defendant's violation of the statute. Certainly, the weather, the darkness and plaintiff's attire were all matters beyond the control of defendant. It was held in the *Satterlee* case that 'the issue as to whether the circumstances were such as to excuse violation' should be left

to the trier of the fact." Pages 479 and 480 of 35 Cal.2d, page 535 of 218 P.2d.

The judgment appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.



120 Cal.App.2d 531

PEOPLE v. SMITH.

Cr. 5027.

District Court of Appeal, Second District,
Division 1, California.

Oct. 1, 1953.

Criminal prosecution in which defendant pleaded guilty to having unlawfully received stolen automobile knowing that same was stolen. After judgment of conviction and sentence were entered, defendant filed motion to vacate judgment and sentence, and plea of guilty. The Superior Court, Los Angeles County, Charles W. Fricke, J., denied defendant's motion, and defendant appealed. The District Court of Appeal, White, P. J., held that in absence of claim that state officer had participated in alleged misrepresentation to defendant that charge against defendant was for having received stolen property, when actual charge made against defendant was having unlawfully received stolen automobile, defendant's plea of guilty entered to such charge was valid, and no facts existed which vitiated plea, which, without any fault of negligence of defendant, were not presented to court.

Order affirmed.

1. Criminal Law ⇨998

Motion to vacate conviction is no more than petition for writ of error coram nobis.

2. Criminal Law ⇨997(6)

Writ of error coram nobis does not authorize court to revise and review its opinions, but enables it to recall an adjudication made while some fact existed which, if before the court, would have prevented rendition of judgment, and

which without any fault or negligence of accused, was not presented to court.

3. Criminal Law ⇨268

Reliance on advice or assurance by private counsel is not sufficient to vitiate plea entered in reliance thereon, in absence of proof that judge or prosecuting attorney or other state officer participated in alleged misrepresentation.

4. Criminal Law ⇨273

Private attorney is agent of party selecting attorney, and fact that plea of guilty is entered in accordance with advice and persuasion or expression of matter of opinion by private attorney or wilful false statements of factual matters by attorney, will not vitiate plea.

5. Criminal Law ⇨273

In absence of claim that state officer participated in alleged misrepresentation to defendant that charge entered was for having received stolen property, when actual charge was for having unlawfully bought and received stolen automobile, defendant's plea of guilty entered to such charge was valid. Vehicle Code, § 503; Pen.Code, §§ 496, 1237.

6. Criminal Law ⇨997(2)

Writ of error coram nobis may not be used to correct errors which occur in trial court and which could have been reached by motion for new trial or appeal from judgment.

7. Criminal Law ⇨997(2)

Statutory remedies of motion for new trial and right of appeal materially abridge office and function of writ of error coram nobis as it was known to common law.

8. Criminal Law ⇨264

Where defendant in open court at time of his arraignment, and with representation of counsel, waived reading of information, and was given opportunity during trial to acquaint himself with contents of information against him, defendant was sufficiently informed of nature of charge against him. Pen.Code, § 496; Vehicle Code, § 503.

9. Criminal Law ⇨997(6)

Writ of error coram nobis is not a catch-all by which those convicted may liti-

gate and re-litigate propriety of convictions ad infinitum, but serves limited and useful purpose of correcting errors of fact which cannot be corrected in any other manner.

10. Criminal Law §997(2)

Writ of error coram nobis is not available where other and adequate remedies exist.

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loeb, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

On November 25, 1952, an information was filed by the District Attorney of Los Angeles County wherein defendant was charged in Count I with the crime of grand theft; Count II accused him of a violation of section 503 of the Vehicle Code, and in Count III defendant was charged with a violation of section 496 of the Penal Code, in that he unlawfully bought and received a certain 1948 Buick automobile knowing that the same had been stolen. It was further alleged in the information that defendant had suffered two prior felony convictions, for each of which he had served a term of imprisonment in the State prison.

On November 28, 1952, defendant, with his counsel present, was arraigned, waived the reading of the information and pleaded not guilty to each of the charges therein contained. Trial was set for January 9, 1953. On January 6, 1953, defendant, accompanied by his counsel, appeared in court and upon his motion the cause was advanced to that date from January 9th. Thereupon, with leave of court, defendant withdrew his plea of not guilty previously entered to Count III and entered his plea of "Guilty as charged in Count 3 of the information". At that time, defendant also admitted the two prior convictions alleged in the information. Defendant requested, and was granted, leave to file an application for probation. On January 29, 1953, probation was denied and judgment and

sentence rendered as to Count III of the information. Counts I and II of the information were dismissed.

On February 16, defendant, represented by new counsel, filed notice that he would move to set aside the judgment, sentence and plea of guilty. On February 25, 1953, motion to set aside the judgment, sentence and plea of guilty was heard and denied.

Defendant now prosecutes this appeal from the order of the trial court denying his motion to set aside and vacate the judgment.

In support of his motion to set aside his plea of guilty, and the judgment and sentence, defendant presented two affidavits, one by himself and the other by his father.

In his own affidavit, defendant averred that he had never seen a copy of the information filed against him; that he understood and believed that in Count III of the information he was charged with receiving stolen property in violation of section 496 of the Penal Code; "that the only property recovered by the police officers from the possession of Affiant were two automobile fender skirts taken by the police officers from the garage of Affiant's parents; that said fender skirts were purchased by Affiant at least twelve calendar months prior to the date of his arrest on the herein charge from a man at Venice Boulevard and Union Avenue; that Affiant paid said man the sum of \$12.00 therefor and that at the time of said purchase Affiant believed and understood that said individual was the legal owner thereof;".

Defendant further averred that on January 2, 1953, he consulted with his then attorney and was advised by the latter to plead guilty to Count III of said information involving the crime of receiving stolen property. Defendant understood and believed that the stolen property involved were two fender skirts, because this was the only property found in his possession when he was apprehended by the police. Under the belief that Count III charged him with receiving two automobile fender skirts, defendant agreed with his counsel, and did, enter a plea of guilty to said count.

Defendant stated in his affidavit that he did not know when he entered his plea of guilty that in fact he was pleading guilty to knowingly receiving a stolen 1948 automobile, with which in Counts I and II of said information he was charged with having stolen and driven. Defendant averred that, had he known the actual property involved in his plea, he would not have entered his plea of guilty. The first occasion upon which defendant was aware of the nature and extent of the property involved in his plea was when he was interviewed by the probation officer on January 13, 1953. He was advised by him he had pleaded guilty to receiving a stolen automobile. Upon such advice defendant replied he was not guilty of these charges. Shortly thereafter in consultation with his then attorney, defendant advised him of his conversation with the probation officer. The attorney advised him that it was "too late" to do anything about his guilty plea at that time. Immediately after defendant was sentenced on the 29th of January he sought the services of new counsel.

There was also filed an affidavit subscribed to by defendant's father in which it was set forth that the former resided with affiant and his wife in Los Angeles for some two years prior to the date of defendant's arrest. Defendant's father further averred that approximately three days after the arrest of the former, the police removed from the premises of affiant's home two auto fender skirts which had belonged previously to affiant's son; that to affiant's personal knowledge these fender skirts had been in his garage since October, 1951.

[1] In California a motion to vacate judgment and set aside a plea of guilty is the same as a petition for a writ of error *coram nobis*, *People v. Adamson*, 33 Cal.2d 286, 201 P.2d 537; *People v. Gilbert*, 25 Cal.2d 422, 154 P.2d 657; *People v. Cook*, 97 Cal.App.2d 284, 285, 217 P.2d 498.

[2] "The writ of error *coram nobis* is not intended to authorize any court to revise and review its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendi-

tion of the judgment, and which, without any fault or negligence of the party, was not presented to the court. 1 Freeman on Judgments, § 94; 23 Cyc. 884." [25 Cal. 2d 422, 154 P.2d 667.]

[3] It is established law that the mere advice or assurances by a private attorney will not vitiate a plea entered in reliance thereon, unless such representations of the attorney amount to an unqualified factual representation (which is untrue) "that the state or a responsible officer thereof, such as a judge of competent authority or a district attorney, has entered into a bargain purporting to commit the state to give the defendant a reward, in the form of immunity or a lesser punishment than he might otherwise receive, in exchange for a plea of guilty, where such representation is apparently substantially corroborated by acts or statements of a responsible state officer, is in good faith relied upon by the defendant, and actually operates to preclude the exercise of free will and judgment on the part of the defendant.

[4] " * * * Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent." *People v. Gilbert*, supra, 25 Cal.2d page 443, 154 P.2d at page 667.

[5] In the instant proceeding appellant's main and basic contention is that "he believed he was charged with receiving stolen property in Count III of said information. * * * and pled guilty to Count III on the advice of his attorney * * *." Here there is no claim that any state officer directly or indirectly participated in the alleged misrepresentation made to appellant. It must therefore be held that the plea of guilty was valid and that no facts existed which did vitiate the plea, and which, without any fault or negligence of the accused, were not presented to the court.

Strikingly similar to the instant proceeding is the case of *People v. Martinez*, 88

Cal.App.2d 767, 199 P.2d 375, 378, wherein the accused, after entering a plea of not guilty to the crime of murder, changed his plea to guilty. The trial court found the crime to be murder of the first degree. Subsequently, defendant claimed that he was persuaded by his counsel to change his plea to guilty upon the representation that he was pleading guilty to murder of the second degree. The appellate court held that the "alleged misrepresentations or bad advice of his counsel * * * is not sufficient to vitiate a plea entered in reliance thereon".

[6] Further, an unbroken line of decisions in California hold that the writ of error *coram nobis* may not be used to correct errors which occur in the trial court and which could have been reached by motion for a new trial or an appeal from the judgment, *People v. Mooney*, 178 Cal. 525, 174 P. 325; *People v. Dunlop*, 102 Cal.App.2d 314, 227 P.2d 281; *People v. Krout*, 96 Cal.App.2d 215, 217, 214 P.2d 596; *People v. Goold*, 90 Cal.App.2d 640, 641, 203 P.2d 118; *People v. Ward*, 96 Cal.App.2d 629, 216 P.2d 114; *People v. Watkins*, 92 Cal. App.2d 375, 206 P.2d 1118; *People v. Young*, 88 Cal.App.2d 601, 199 P.2d 21.

[7] The statutory remedies of a motion for a new trial and the right of appeal very materially abridge the office and functions of the writ of error *coram nobis* as it was known to the common law.

The claimed error in the case at bar could have been reached by motion for a new trial or by appeal. Section 1237 of the Penal Code permits an appeal to be taken from final judgment of conviction. Following entry of the plea of guilty in the instant case, judgment was rendered and sentence pronounced upon appellant. Although he could have made a motion for a new trial or taken an appeal to correct the asserted errors, appellant failed to do either.

[8] Appellant's final claim that he was not apprised of the nature of the offenses charged against him is unavailing. The record reflects that in open court, at the time of his arraignment, represented by an attorney of his own selection, appellant

waived the reading of the information. Manifestly, it was at all times within the power of appellant to acquaint himself with the contents of the information after a copy thereof was delivered to his counsel at the time appellant was arraigned.

[9, 10] As was said by the court in *People v. Martinez*, supra, 88 Cal.App.2d at page 774, 199 P.2d at page 379, "The writ of error *coram nobis* is not a catch-all by which those convicted may litigate and re-litigate the propriety of their convictions *ad infinitum*. In the vast majority of cases a trial followed by a motion for a new trial and an appeal affords adequate protection to those accused of crime. The writ of error *coram nobis* serves a limited and useful purpose. It will be used to correct errors of fact which could not be corrected in any other manner. But it is well-settled law in this and in other states that where other and adequate remedies exist the writ is not available."

The order appealed from is affirmed.

DORAN, J., and SCOTT, Justice pro tem., concur.



120 Cal.App.2d 396

WARREN v. WARREN.

Civ. 19452.

District Court of Appeal, Second District,
Division 2, California.

Sept. 28, 1953.

Rehearing Denied Oct. 19, 1953.

Divorce suit. The Superior Court of Los Angeles County, Ellsworth Meyer, J., granted plaintiff an interlocutory judgment of divorce after a default hearing, and denied defendant's subsequent motion to vacate such judgment, and defendant appealed from the order and interlocutory judgment. The District Court of Appeal, Fox, J., held that a review of the sufficiency of evidence is not available on appeal from judgment rendered on default, but that order that defendant move from real property "forthwith," and

a restraining order, were without foundation in the allegations of complaint or in the prayer, and should have been stricken from the decree.

Judgment ordered modified, and as so modified affirmed; order affirmed.

1. Divorce ⇨184(1)

A review of the sufficiency of the evidence was not available on appeal from an interlocutory judgment of divorce rendered on default, notwithstanding fact that defendant had filed a reporter's transcript of evidence produced before trial court at the default hearing.

2. Divorce ⇨253

Where divorce complaint charged cruelty, and requested an equitable division of the property, it was within trial court's discretion upon the charge of cruelty being sustained, to award all the community property to the plaintiff as the innocent spouse, notwithstanding contention that relief granted exceeded the relief requested.

3. Divorce ⇨186

Unauthorized orders in divorce suit wherein judgment was rendered on default, directing defendant to move from real property "forthwith", and restraining defendant from molesting plaintiff, even though without foundation either in allegations of complaint or in the prayer, did not require a reversal of interlocutory decree of divorce, but striking of such orders from decree would be sufficient.

4. Divorce ⇨184(4)

On appeal from refusal to vacate interlocutory judgment of divorce rendered on default, it would be assumed in support of order denying motion to vacate default, that trial court had resolved against defendant a conflict in affidavits of defendant and plaintiff's attorney, relative to a property settlement agreement allegedly agreed to be drawn by plaintiff's attorney, pending which, it was allegedly agreed, that suit was to be held in abeyance.

5. Appeal and Error ⇨957(1)

An order denying a motion to vacate a default judgment will not be reversed in absence of a clear showing of an abuse of

discretion by the trial court. Code Civ. Proc. § 473.

Edward S. Cooper, Los Angeles, for appellant.

Gladys Towles Root and Joseph M. Rosen, Los Angeles, for respondent.

FOX, Justice.

Defendant wife appeals from an interlocutory judgment of divorce granted to plaintiff after a default hearing, and from an order denying her motion to vacate said judgment.

In his complaint for a divorce on the grounds of extreme cruelty, filed on May 22, 1952, plaintiff alleged the existence of community property consisting of household furniture and furnishings and a designated piece of real property. In addition to asking that a divorce be granted and costs of the suit awarded him, plaintiff prayed "For an equitable division of the community property" as well as "For such other and further relief as to the court may seem just and equitable." Defendant's default was entered on June 13, 1952. The matter was heard on July 1, 1952, resulting in an interlocutory decree of divorce for plaintiff. The judgment also awarded all of the claimed community property (the house and its furniture) to plaintiff, ordered defendant to move out of the residence forthwith, and restrained defendant from molesting plaintiff.

On July 15, 1952, defendant made a motion to vacate the interlocutory judgment and petitioned to file her appended answer and cross-complaint. These papers were prepared by her former attorney. The notice of motion, which failed to state any grounds on which it was based, was submitted upon supporting affidavits and the files and records of the case. It may also be noted that the motion contained no request that the default be set aside, although this may be implied from the petition to file a proposed answer and cross-complaint. The matter was heard upon defendant's affidavit and proposed answer and cross-complaint, and upon the counter-affidavits of plaintiff's counsel and the latter's secretary, Ruby Cassiday. On July 30, 1952, the court

denied defendant's motion to set aside and vacate the default judgment and for leave to file answer and cross-complaint. Defendant appeals from this order, and from the interlocutory judgment.

[1] Defendant attacks the judgment on the ground that the evidence is insufficient to support it. Since this is a default judgment that question may not be raised on appeal. In *Lukasik v. Lukasik*, 108 Cal.App. 2d 609, at page 613, 239 P.2d 497, 499, it is pointed out that "On an appeal from the judgment rendered on default a review of the sufficiency of the evidence is not available." *Line v. Line*, 75 Cal.App.2d 723, 728, 171 P.2d 733; *Reed Orchard Co. v. Superior Court*, 19 Cal.App. 648, 662, 128 P. 9, 18. This rule is not affected by the fact that defendant has filed in connection with this appeal a reporter's transcript of the evidence produced before the trial court at the default hearing. *Lukasik v. Lukasik*, supra; *Crackel v. Crackel*, 17 Cal.App. 600, 601-602, 121 P. 295.

[2] Defendant challenges the judgment on the theory that the relief granted exceeds that requested in the complaint since all the community property was awarded to plaintiff under a prayer demanding an equitable division thereof. In this connection it must be borne in mind that the complaint charges cruelty. Upon this charge being sustained it was within the trial court's discretion to award all the community property to plaintiff as the innocent spouse. *Nelson v. Nelson*, 100 Cal.App.2d 348, 350, 223 P.2d 636; *Barham v. Barham*, 33 Cal.2d 416, 431, 202 P.2d 289. We must assume that under the evidence such a distribution of the property appeared equitable to the trial court. There was ample foundation therefor both in the law and in the prayer.

[3] There are, however, two aspects of the interlocutory decree for which there is no foundation either in the allegations of the complaint or in the prayer. These are: (1) the order that defendant move from the real property "forthwith"; and (2) the restraining order. These unauthorized orders, however, do not require a reversal of

the judgment. The problem can be adequately met by striking them from the decree. *Viera v. Viera*, 107 Cal.App.2d 179, 236 P.2d 630.

In her affidavit in support of her motion to vacate the judgment, defendant states that at a conference between herself and plaintiff and his attorney an oral agreement was made for the disposition of their community property; that plaintiff's attorney was to draw the necessary papers to carry out that agreement and that nothing would be done until the papers were delivered to her and agreed upon. No such papers were ever presented to her.

The affidavits, however, of plaintiff's attorney, Mrs. Root, and her secretary present a very different picture. The secretary states that on the day following the filing of the complaint she received a telephone call from a woman who identified herself as Lizzie Warren, the defendant. In the course of the conversation the secretary advised defendant that if she did not have an attorney she should get one; that she had ten days to answer. Defendant stated, however, among other things, that "she did not need an attorney."

Mrs. Root's affidavit reveals that she held two conferences at which the defendant was present. At the first of these only Mrs. Root and defendant were present; at the second plaintiff was also there. At the first conference defendant stated that if "the plaintiff wanted the divorce and wanted the property she didn't want anything. * * *" Arrangements were then made for the second conference. In response to counsel's inquiry of defendant, at the latter conference, whether she had discussed a settlement with plaintiff relative to their community interests, she replied: "I will not fight with him. If Elijah Warren wants everything he can have it. I will not come again and I will not go to court. I can live well without him." Mrs. Root then advised defendant that "if she * * * did not obtain counsel and file an answer and be heard in court * * * she would lose everything, and by her nonappearance she would agree that he could take everything by order of court." Mrs. Root also

explained to defendant that by reason of her attitude she, Mrs. Root, would not proceed with the preparation of a property settlement agreement and "advised defendant to obtain an attorney immediately to represent her," and further stated to defendant that "she had but ten days to answer the * * * complaint and if she did not do so within that time the plaintiff would take a default * * * against her and she would, therefore, not be able to claim any rights [or] property * * *." Defendant did not employ counsel and in due time her default was entered and the case was heard as an uncontested matter. It is the ensuing judgment that defendant seeks to have vacated.

[4] We must assume in support of the order that the trial court resolved the conflict in the affidavits of the defendant and Mrs. Root, relative to a property settlement agreement between plaintiff and defendant, against the defendant. *Doak v. Bruson*, 152 Cal. 17, 19, 91 P. 1001; *Gardner v. Gardner*, 72 Cal.App.2d 270, 271, 164 P.2d 500. Thus defendant failed to prove fraud on the part of plaintiff or his counsel. It is also clear that defendant was repeatedly told to get an attorney and that she was advised of the consequences if she did not do so. Defendant, therefore, failed to establish any impelling reason why her motion should be granted under Code of Civil Procedure section 473. *Davidson v. Davidson*, 90 Cal.App.2d 809, 819, 204 P.2d 71; *Trujillo v. Trujillo*, 71 Cal.App.2d 257, 260, 162 P.2d 640.

[5] It is elementary that such an order will not be reversed in the absence of a clear showing of an abuse of discretion by the trial court. *Warren v. Warren*, 2 Cal. App.2d 171, 37 P.2d 465; *Mills v. Mills*, 101 Cal.App. 248, 281 P. 707. No abuse of discretion is here shown.

It is ordered that the judgment be modified by striking therefrom the paragraphs which ordered that: (1) "the defendant is restrained from molesting the Plaintiff" and (2) "the defendant move from the real property * * * forthwith." As so modified the judgment is affirmed. Also, the order denying defendant's motion to vacate

the judgment is affirmed. Each party will bear his own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.



120 Cal.App.2d 517

CHRISTENSEN et al. v. THURBER et al.
Civ. 19608.

District Court of Appeal, Second District,
Division 1, California.
Oct. 1, 1953.

Hearing Denied Nov. 24, 1953.

Action to enjoin defendants from constructing a building in alleged violation of City Ordinance requiring minimum site area for houses to be one lot, or seventy five hundred square feet of lot area per dwelling. The Superior Court of Los Angeles County, Joseph A. Sprinkle, Jr., J., rendered a judgment adverse to the plaintiffs and the plaintiffs appealed. The District Court of Appeal, Robert H. Scott, J. pro tem., held that where defendants owned house which was placed partly on one lot owned by defendants and partly on the one-half of an adjacent lot owned by defendants, and combined area of property owned by defendants exceeded 15,000 square feet, defendants were properly held to be entitled to build another house on such property under ordinance, notwithstanding that on lot on which defendants proposed to construct house, without including area of the other one-half lot owned by defendants, there was not sufficient land to provide a 7,500 square feet site.

Judgment affirmed.

1. Statutes $\Leftarrow$ 219

Contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is given great respect.

2. Statutes $\Leftarrow$ 219

Administrative interpretation of a statute will be accorded great respect by courts and will be followed if not clearly erroneous.

3. Municipal Corporations **601(22)**

Where defendants owned house which was placed partly on one lot owned by defendants and partly on the one-half of an adjacent lot owned by defendants, and combined area of property owned by defendants exceeded 15,000 square feet, defendants were properly held to be entitled to build another house on such property under city ordinance providing that minimum site area should be one lot, or 7,500 square feet of lot area for each dwelling, notwithstanding that on lot on which defendants proposed to construct house, without including area of the other one-half lot owned by defendants, there was not sufficient land to provide a 7,500 square feet site.

G. G. Baumen, Los Angeles, for appellants.

Delbridge, Hamblin & Linton and Maitland Bishop, Pasadena, for respondents.

ROBERT H. SCOTT, Justice pro tem.

Plaintiffs appeal from an adverse judgment in an action brought by them seeking to enjoin defendants from constructing a building in alleged violation of an ordinance of the city of Sierra Madre.

Plaintiffs own homes on Manzanita Avenue in the city of Sierra Madre near property of defendants. The latter own a parcel of land with 150 feet frontage on Manzanita, originally consisting of lot 30 (100 feet frontage) and one-half of lot 29 (50 feet frontage) adjoining it. Lot 30 has a depth of 190 feet on Park Avenue and lot 29 has an equal depth. Prior to the time of trial defendants had sold a portion of lot 30 facing Park Avenue at the end farthest away from Manzanita Avenue. After deducting the area thus sold, defendants had 20,985 square feet of contiguous land remaining in their parcel, made up of the remaining portions of lot 30 and one-half of lot 29. On this parcel was located the house which was the dwelling of defendants, facing on Manzanita and placed partly on lot 29 and partly on lot 30. At the time the complaint was filed in the case, defendants had obtained a building permit from the city and had started to erect an-

other residence on their parcel, located at the side of the one already there, and between it and Park Avenue.

It is plaintiffs' contention on appeal that the permit should not have been issued and that defendants' erection of the additional house is contrary to city ordinance, is objectionable and should be precluded by court order.

It is undisputed that Ordinance 391 of the City of Sierra Madre provides in Section 4, subparagraph C that: "The minimum site area shall be one lot, or seventy five hundred (7500) square feet of lot area per each dwelling."

Plaintiffs assert that on lot 30, considered by itself and without including the area of one-half of lot 29 not covered by the existing structure, there is not sufficient land to provide a 7500 square foot site, because part of it has been sold and part of it is covered by the house already built. They do not deny that the combined area remaining of the two lots exceeds 15,000 square feet.

Defendant Ruth Thurber consulted the city attorney of said city on July 16, 1951, concerning the proposed erection of the added residence and was advised by him that more than one structure could be erected on one lot provided there were 7500 square feet of lot space for each building occupying a portion of said lot and "that if that area included more than 15,000 square feet that she could safely proceed with the building". On September 17, 1951, said defendant showed the city attorney and the building inspector of said city a drawing which showed lots 29 and 30 and indicated the portion of lot 30 which had been sold and showed the remaining area of 20,935 square feet, and the city attorney then informed said defendant and the building inspector that "it was lawful to erect said building in the place indicated on the drawing as said lots 29 and 30".

At a meeting of the City Council of the City of Sierra Madre on September 25, 1951, at which defendants were present, said city attorney advised the council and defendants that the erection of the building

on the northern portion of lot 30 complied in all respects with the ordinance 391.

Plaintiffs filed their complaint on this case on October 17, 1951. They secured a preliminary injunction restraining defendants from proceeding with construction pending final determination of the suit.

It cannot be said as a matter of law that the interpretation of the quoted provision of Section 4(C) was erroneous. It was consistent with previous rulings by the city attorney on the same question, according to his statement, and could not therefore be regarded as a special favor or concession to defendants in this case.

[1] "The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, while not controlling, is given great respect." *County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 643, 122 P.2d 526, 531.

[2] "* * * the administrative interpretation of a statute will be accorded great respect by the courts and will be followed if not clearly erroneous." *Bodinson Mfg. Co. v. California Employment Comm.*, 17 Cal.2d 321, 325, 109 P.2d 935, 939; *County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712, 112 P.2d 10; *In re Adoption of Parker*, 31 Cal.2d 608, 615, 191 P.2d 420.

[3] Plaintiffs admit that, "If the proposed building were being constructed as a sole dwelling upon an approved and subdivided lot within the city, regardless of the area of such lot * * * respondents (defendants) would have adequate area to comply with the requirements of the Ordinance".

Section 4, subparagraph F of Ordinance 391 provides:

"Rear Yard Required: * * * On lots having two or more dwellings the required rear yard for the dwelling nearest the rear lot line shall be not less than ten (10) feet and the distance between separate dwellings on the same lot shall be not less than thirty-five (35) feet." It is urged by plaintiffs that defendants' new house violates this requirement. It appears however that the structure which was located on the south end of lot 30, being that area which had been sold by defendants, is more than the

required 35 feet distance from the new house. It is appellants' impression that Section 4F (which as above noted deals with "Rear Yard Required") also applies to the side yard, and points out that there is a distance of only about 12 feet, and not 35 feet, side yard between defendants' older house fronting on Manzanita Avenue and the new house similarly fronting on the same street which is the subject of this controversy.

The applicable provisions of the ordinance on this feature of the case seem to be contained in Section 4E which provides in part: "Side yard Required: On the interior lots there shall be a side yard on each side of a dwelling * * * of not less than five (5) feet. * * *"

"On corner lots, the required side yard line adjoining the interior lot shall be the same as for interior lots. The required side yard on the street side shall be ten percent (10%) of the width of the lot, provided it shall not be less than ten (10) feet; * * *"

Plaintiffs made no claim in their complaint of any violation of the last paragraph above quoted, and the diagram they attached to the complaint shows a side yard on the street side of 10 feet, which would be ten percent of the width of lot 30. The distance of 12 feet between the old house and the new house satisfies legal requirements as to side yards.

Various other requirements of city ordinances are mentioned, which were determined by the trial court to have no application to the present case. We find nothing in the pleadings or evidence which requires a reversal of the judgment. Defendants are entitled to proceed with the erection of the additional house as contemplated.

As a court of equity the trial court had before it the subdivision map which was filed in January, 1907, showing lots 100 feet wide and 190 feet deep, and doubtless considered evidence including matters of common knowledge as to the changes which have taken place since that time in that community and in those adjacent to it. It may well have concluded that equity required an interpretation and application of

the city's ordinances in a manner which was legally correct but would permit the highest and best use of property by its owners consistent with rights of other property owners and the public. We are unable to say that the decision of the trial court, based on facts concerning which there is no dispute, was legally erroneous or inequitable to the plaintiffs.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



120 Cal.App.2d 418

STUMP v. TIPPS et al.

Civ. 8291.

Sac. 6328.

District Court of Appeal,
Third District, California.

Sept. 28, 1953.

Action by creditor to quiet title to reserve funds of partnership which had been assigned to creditor as security for note given by one partner to creditor during process of partnership dissolution. The Superior Court, Nevada County, Arthur Coats, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that agreement between creditor and one partner bound the other partner, and creditor had prior right to collect and apply to his note the reserve accounts.

Judgment affirmed.

1. Partnership ⇨262

An agreement between two partners whereby business and assets were turned over to one partner, and other partner withdrew from partnership affairs, constituted a "partnership dissolution" within statute. Corporations Code, § 15029.

See publication Words and Phrases, for other judicial constructions and definitions of "Partnership Dissolution".

2. Partnership ⇨280

After dissolution a partner can bind the partnership by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution. Corporations Code, §§ 15029, 15030, 15035.

3. Partnership ⇨279

Where two partners executed dissolution agreement, whereupon creditor advanced money to partner to use in paying partnership debts, and creditor took assignment of partnership reserve fund as security for purported partnership's note given to creditor by partner, creditor had prior right to collect and apply to his note the reserve account as against copartner, auditors and arbitrators who had obtained judgment in an action for accounting after dissolution. Corporations Code, §§ 15029, 15030, 15035.

4. Judgment ⇨673

Where partner brought action for accounting after dissolution against copartner, and creditor intervened but dismissed his complaint before adjudication, and it was adjudicated that copartner was indebted to partner for value of interest in partnership, the judgment was not res judicata as to claims of creditor. Corporations Code, § 15029.

5. Parties ⇨48

Where partner brought action against copartner for accounting after dissolution, and partnership creditor intervened, creditor had right to dismiss his complaint in intervention in view of fact that no demands had been made against him. Corporations Code, § 15029.

Crofford W. Bridges and Leo J. Todd,
Grass Valley, for appellants.

Chamberlain & Chamberlain and F. L. Sinclair, Auburn, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and respondent Horace A. Stump brought this action against defendants and appellants, Frank Tipps, L. D. Crain and David Hartman, and other de-

fendants not appealing. By his complaint respondent sought to have his title quieted to certain assigned claims against Bank of America National Trust & Savings Association and Mercantile Acceptance Corporation of California as against the claims of defendants to an interest therein. Frank Tipps and one M. R. Bickham had been co-partners conducting an automobile sales business in Grass Valley, and in the conduct of that business had sold commercial paper, representing unpaid amounts on the purchase of automobiles to the bank and the acceptance corporation. This was done under agreements whereby sums were withheld by the acceptors against possible losses through failure of purchasers to complete their payments. The partnership got into financial difficulties and in early August of 1949 Bickham approached respondent with the suggestion that he come to the financial aid of the business. This respondent was willing to do, provided, as he testified, Tipps would be no longer associated with the business as partner or, otherwise and that the money advanced by respondent should be used exclusively for the payment of partnership obligations then existing, it being contemplated by him that he would advance money enough to pay all such obligations. On August 6, 1949 Tipps and Bickham made an agreement providing for the dissolution of the partnership, the purchase by Bickham of Tipps' interest in its assets and the payment by Bickham of all partnership obligations. Bickham was to pay Tipps what would, upon audit, be determined to be the value of his interest in the partnership assets. He was to make certain payments and delivery of assets in kind at once and the balance in monthly installments commencing when the audit was complete. Tipps executed a bill of sale of his interest to Bickham and the same was escrowed for delivery against full payment. The immediate possession of all of the partnership business and assets was given to Bickham and the agreement declared that "Said partnership shall be hereby dissolved." Upon being shown this signed agreement respondent began advancing money and in a short time had advanced nearly \$12,000. On October 11,

1949 he received from Bickham a promissory note for that sum, purporting to be the note of the partnership. He testified that his loans were made to the partnership, as did Bickham. He received as security for the payment of the note a chattel mortgage upon certain shop equipment and an assignment of the reserve funds held by the bank and the acceptance corporation. Bickham and Tipps proceeded along the lines of their agreement and appellant Hartman was employed as auditor. But on December 8, 1949 Tipps sued Bickham, filing what he denominated a "Complaint for Accounting after Dissolution of Partnership." Therein he charged various fraudulent conduct upon the part of Bickham and breaches of his duty as partner in control after dissolution and he prayed that the August 6, 1949 agreement be declared null and void; that an account be taken of all partnership transactions and that Bickham account for transactions as to property of the firm "since its purported dissolution under the agreement of August 6, 1949." He asked that the partnership assets be sold, the debts paid and the surplus divided. Respondent intervened in that action, but subsequently and before trial, he dismissed his complaint and was not a party to the suit thereafter. In another action he foreclosed his chattel mortgage and credited the amount received upon his note. The Tipps-Bickham action went to judgment October 20, 1950. In the meantime the parties had, however, stipulated for arbitration, which was had; a motion had been made for judicial confirmation of the arbitration effected; objections thereto were made, and the court after further hearing entered judgment as follows: That Bickham pay to Tipps the sum of \$3,500; to David Hartman, for auditing services during the accounting suit and arbitration, the sum of \$1,155; to Maurice E. Whitting for auditing services the sum of \$234; and to L. D. Crain and Arnold Sullivan, as arbitrators, the sum of \$300 each. It was further ordered that if these sums were not paid as adjudged within 15 days from the entry of judgment the assets of the firm be sold under execution and from the proceeds of the sale the

amounts adjudged be paid, and the balance paid to Bickham. On June 21, 1951 this action was begun by respondent and judgment was procured by him in his favor which, speaking generally, quieted his title to the reserves held by the bank and the acceptance corporation as against any claims thereto by the defendants.

[1-3] The trial court found, and the finding is unchallenged, that respondent had advanced the full \$12,000 and found upon substantial evidence that this money had been used to pay partnership debts. Appellants' contention was that these moneys were not advanced to the partnership, but to Bickham individually, and that the purported partnership note for the repayment thereof given respondent by Bickham was of no effect and was beyond the power of Bickham to execute for the partnership. But both Bickham and respondent testified that the moneys were loaned to the partnership to pay partnership debts. The court so found and the finding is thus supported. Equally supported is the finding that to secure the repayment of these loans evidenced by the note, Bickham assigned to respondent the reserve accounts, which assignments were accepted by the holders of those reserves. The amounts which each acceptor held was determined and is not in dispute and these funds aggregate several thousand dollars less than the amount unpaid upon respondent's note. As to the use made of the money advanced by respondent, there was ample testimony that it was used exclusively to pay existing partnership creditors. We think, therefore, the trial court was correct in holding that Bickham had authority to deal with respondent as he did and to secure the repayment of funds loaned by the assignments he made. He was acting to wind up partnership affairs pursuant to the agreement between the partners, and clearly that agreement was sufficient to stand as a partnership dissolution, for by it the business and the assets of the firm were turned over to Bickham and Tipps withdrew from active participation in partnership affairs. "The dissolution of a partnership is the change in the relation of the partners

caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Sec. 15029, Corporations Code. "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Sec. 15030, Corporations Code. "(1) After dissolution a partner can bind the partnership * * * (a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution; * * *." Sec. 15035, Corporations Code. The dealings between Bickham and respondent fall squarely within the foregoing statutes and so far as Tipps is concerned he was bound thereby and respondent was properly adjudged to have as against Tipps a prior right to collect and apply to his note the reserve accounts which were the subject of this action. The same priority existed as to appellants Hartman and Crain. Neither of them was a creditor when respondent received his assignments and no reason is shown why as to them likewise the assignments should not vest in respondent a prior right to the funds assigned.

[4,5] Appellant Tipps contends that the judgment rendered in the action he brought against Bickham for accounting in which it was adjudicated that Bickham was indebted to him for a certain sum, being the value of his interest in the partnership, was res adjudicata as to claims of respondent, but it is clear that respondent never entered that suit nor was a party thereto except through his complaint in intervention which was dismissed before matters within the embrace of that action were adjudicated. He could not, therefore, be bound by the judgment and if it had been sought in any way to bind him thereby it was for the plaintiff in that action to make him a party thereto. Respondent had full right to dismiss his complaint in intervention since no demands had been made against him. *Kaufman v. Superior Court*, 115 Cal. 152, 155, 46 P. 904.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

120 Cal.App.2d 548

RUPLEY v. JOHNSON, Judge of Placerville
Judicial Dist.
Civ. 8451.

District Court of Appeal, Third District,
California.

Oct. 2, 1953.

Hearing Denied Nov. 24, 1953.

Proceedings on petition for writ of mandate directing judge of Placerville Judicial District to dismiss criminal complaints. Petitioner and various truck drivers employed by him were cited for traffic violations between April and August. Petitioner appeared in court in September and requested that arraignment be postponed until November. In November petitioner appeared before the court, objecting that court had no jurisdiction of the matter. On March 11 complaints were signed and parties were ordered to appear on March 18 for trial. The Placerville Judicial District, Leon G. Johnson, J., on April 9, denied petitioner's motion to dismiss, and petitioner's counsel served copies of petition for writ of mandate. The District Court of Appeal, Schottky, J., held that since no criminal proceedings on which trial could be had, were pending until complaints were filed in March, defendants were not denied speedy trial.

Alternative writ discharged and petition for peremptory writ denied.

1. Statutes ⇨231

For purposes of statutory construction, all of the statutory provisions in all of the codes must be read together and harmonized if possible.

2. Criminal Law ⇨573

Where traffic violators were cited for traffic offenses between April and August, appearance was postponed until November at traffic violators' request, at appearance violators did not plead guilty or waive filing of complaint, complaints were not filed until March, and violators were ordered to appear a week later, the violators were not denied a speedy trial, since no criminal proceedings upon which a trial could be had were pending until complaints were filed. Const. art. 1, § 13; U.S.C.A.Const. Amend. 6; Pen.Code, §§ 740, 1382, subd. 3, 1426; Vehicle Code, §§ 739, 739.1.

Herman D. Jerrett, Sacramento, for appellant.

Robert E. Roberts, Paul J. McClarrinon, Asst. Dist. Atty., Placerville, for respondent.

SCHOTTKY, Justice.

Petitioner filed in this court a petition for a writ of mandate directing the Judge of the Placerville Judicial District to dismiss certain criminal complaints filed therein. We issued an alternative writ, and following the filing of respondent's answer and return the matter was argued before this court by respective counsel.

The factual situation as it appears from the petition and the return is substantially as follows:

Petitioner is a copartner in the trucking and hauling business. Between April and August, 1952, various drivers of the firm were cited by the California Highway Patrol for certain violations of the traffic laws (principally sections 705 and 711 of the Vehicle Code). Citations were issued to Rupley Bros. and their drivers, and copies of said citations were sent to the then Justice of the Peace Holland, together with signed but unsworn to complaints relating to each citation. These complaint forms were received and retained by the court but it does not appear that they were ever sworn to or filed. Petitioner appeared on the dates set forth in the citations but found the court not open for business. Subsequently, Justice of the Peace Holland sent notice for the reappearance by petitioner on August 25 and 26, 1952, but petitioner communicated with the Justice of the Peace and stated that he wished a few days more so that he could obtain an attorney to represent him, and the appearance date was re-set for September 12, 1952. Thereafter, petitioner's attorney, Herman D. Jerrett, informed Justice of the Peace Holland that he was engaged in a trial at Willows, California, and requested that the appearance and arraignment of petitioner be postponed until November 19, 1952. On said last mentioned date Attorney Jerrett appeared as counsel for petitioner and the persons named in the said citations, but

stated to the court that he was only appearing to object to the authority and jurisdiction of the court and of the acting Justice of the Peace, contending that the court had no jurisdiction because it had no dockets, no receipt book, no records, no signed complaints, and could not act in the matter. Petitioner has never appeared personally in response to the citation nor has he entered any plea thereto. It appears that the former Justice of the Peace had committed certain acts and omissions constituting misfeasance and malfeasance in office, that on August 19, 1952, the records, dockets, files and papers of said Justice's Court were subpoenaed by the grand jury and held by them, that the said Justice of the Peace was removed from his office on December 20, 1952, and that respondent was appointed judge of said court effective February 10, 1953. Thereafter, on March 11, 1953, complaints signed by the complaining witnesses, on oath before respondent as judge of said court, were duly filed and petitioner and the other persons mentioned in the said citations were notified to appear on March 18, 1953. On that date attorney Jerrett appeared as counsel for all of said persons and refused to subject them to arraignment, and made a motion to dismiss all proceedings relating to said citations, which motion was denied on April 9, 1953. Respondent then notified the attorney for petitioner that the arraignment would be held on Tuesday, April 14, 1953, and on said date attorney Jerrett appeared as counsel for all defendants, refused to proceed with the arraignment and requested that all of the cases be postponed until after the instant mandamus proceeding had been heard and decided. He then served upon respondent copies of the petition for writ of mandate and points and authorities in support thereof.

Petitioner contends that he is entitled to a writ commanding that all of said complaints filed on March 11, 1953, be dismissed on the grounds of inexcusable delay, want of prosecution, and the denial of a right to a speedy trial. He cites Amendment VI of the Constitution of the United States, and section 13 of Article I of the Constitution of California, which provide that in 'all

criminal prosecutions the accused shall have the right to a speedy trial. He also cites subdivision 3 of section 1382 of the Penal Code which reads, in part, as follows:

"§ 1382. The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases:

* * * * *

"3. Where the trial has not been postponed upon the defendant's application, if the defendant in a misdemeanor case in an inferior court, is not brought to trial within 30 days after he is arrested and brought within the jurisdiction of the court, unless by his own neglect or failure to appear in court when his presence is lawfully required, his trial must be postponed * * *."

Respondent in reply contends that no complaints were filed until the filing of the complaint on March 11, 1953, and that there is no merit in petitioner's contention that he is entitled to a dismissal of the pending complaints.

Section 739 of the Vehicle Code outlines the procedure by which a person arrested for a violation of the code, but not taken immediately before a magistrate, must be served with a notice to appear in court in answer to the violations. Petitioner in the instant case was served with such notice. Vehicle Code, section 739.1, goes on to provide:

"Whenever written notice to appear has been prepared, delivered and filed with the court, as provided in Section 739 hereof, * * * an exact and legible duplicate copy of said notice when filed with the magistrate specified herein, in lieu of a verified complaint, shall notwithstanding the provisions of Section 1426 of the Penal Code, constitute a complaint to which the defendant may plead 'Guilty.'"

"If, however, the defendant shall violate his promise to appear in court * * *, or shall plead other than 'Guilty' of the offense charged, a complaint shall be filed which shall con-

form to the provisions of said Section 1426, Penal Code, and which shall be deemed to be an original complaint, and thereafter proceeding shall be had as provided by law; provided, that a defendant may, by an agreement in writing, subscribed by him and filed with the court, waive the filing of a verified complaint and elect that the prosecution may proceed upon the written notice mentioned in Section 739 hereof."

It appears here that the petitioner-defendant pleaded other than "guilty" to the offenses charged, and further that he did not waive the filing of the complaint as provided under section 739.1. Therefore, before the court could have had jurisdiction of the causes a complaint, or complaints, must have been filed in accordance with Penal Code section 1426 before the court had any jurisdiction in the matter, or before it could be said that criminal proceedings were pending against petitioner. Section 1426 of the Penal Code was repealed by the legislature in 1951, 1951 Stats. Ch. 1674, sec. 145, before this controversy arose. However, its substance was re-enacted by 1951 Statutes, chapter 1674, section 6, now Penal Code, section 740, which reads as follows:

"Except as otherwise provided by law, all public offenses triable in the inferior courts must be prosecuted by written complaint under oath and subscribed by the complainant. Such complaint may be verified on information and belief."

As was stated in *Ralph v. Police Court*, 84 Cal.App.2d 257, 259, 190 P.2d 632, 634:

"Thus it is quite apparent that whether the arrested person is taken immediately before a magistrate, or is given a five-day notice to appear and pleads not guilty and does not waive the requirement, a complaint under § 1426 of the Penal Code 'must' be filed. Unless waived, as provided by statute, the filing of such complaint is essential to the jurisdiction of the police court. That has been the law of this state for many years. It was stated as follows

in the case of *In re Williams*, 183 Cal. 11, 12, 190 P. 163, 'It goes without saying that it is essential to the jurisdiction of a police court to put a person upon trial for a public offense that there should be on file therein a complaint charging such person with the commission of such offense.' See, also, *People v. Brussel*, 122 Cal.App.Supp. 785, 7 P.2d 403. It is also the law in other jurisdictions. The rule, supported by many authorities, is stated as follows in 22 C.J.S., Criminal Law, § 303 [pages 456, 457]: 'The term "complaint" is a technical one descriptive of proceedings before magistrates. It is and has been defined to be the preliminary charge or accusation against an offender, made by a private person or an informer to a justice of the peace or other proper officer, charging that accused has violated the law. It has also been defined as a preliminary charge before a committing magistrate; * * * The complaint is the foundation of the jurisdiction of the magistrate, and it performs the same office that an indictment or information does in superior courts.' See, also, cases collected 16 C.J. p. 286 § 492."

[1] The rule is well established that all of the statutory provisions in all of the codes must be read together and harmonized if possible. As stated by our Supreme Court in *In re Porterfield*, 28 Cal.2d 91, at page 100, 168 P.2d 706, 712, 167 A.L.R. 675: "It is a well-recognized rule that for purposes of statutory construction the codes are to be regarded as blending into each other and constituting but a single statute. [Citing cases.]"

Sections 739 and 739.1 of the Vehicle Code set forth the procedure when a person is apprehended for an alleged traffic violation and this procedure is somewhat different from the procedure in other misdemeanor cases. The person arrested is served with a written notice to appear before the magistrate in answer to the alleged violation and a copy of said notice is filed with the magistrate. Section 739.1 provides further that if the defendant fails to

SCHNEPFE v. SCHNEPFE.

Civ. 8186.

District Court of Appeal,
Third District, California.

Sept. 29, 1953.

appear or pleads other than guilty a complaint shall be filed "which shall be deemed to be an original complaint, and thereafter proceedings shall be had as provided by law". Said section provides further that a defendant may by agreement in writing waive the filing of a verified complaint and elect to proceed upon the written notice.

In the instant matter no pleas of guilty were entered and no waivers of the filing of verified complaint were filed. Instead, as hereinbefore set forth, petitioner and the other persons cited first appeared and requested continuances, and later refused to plead and objected to proceeding before the court. Thereafter, on March 11, 1953, the complaints which petitioner now seeks to have dismissed by writ of mandate were filed, and petitioner and the other persons cited were ordered to appear on March 18, 1953. At that time counsel for petitioner refused to subject his clients to an arraignment and moved to dismiss the complaint and all proceedings relating to the citations, which motions were denied. Petitioner then filed the instant proceeding.

[2] While it is true that both the state and federal constitutions guarantee a speedy trial to every person accused of crime, we do not believe that the proceedings here attacked show that petitioner and the other persons cited have been deprived of any such right. Under section 739.1 of the Vehicle Code, which must be read in connection with subdivision 3 of section 1382 of the Penal Code, no criminal proceedings upon which a trial could be had were pending until the complaints were filed on March 11, 1953, and, this being so, there is no merit in petitioner's contention that he and the other defendants were denied a speedy trial or were entitled to have the complaints dismissed either under the constitutional provisions hereinbefore referred to or under the provisions of subdivision 3 of section 1382 of the Penal Code.

No other points raised require discussion.

In view of the foregoing the alternative writ heretofore issued is discharged and the petition for a peremptory writ is denied.

VAN DYKE, P. J., and PEEK, J., concur.

Action to have a deed which was absolute on its face declared a mortgage. The Superior Court, Yolo County, Wm. M. Macmillan, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Peek, J., held, *inter alia*, that the evidence supported the trial court's finding that the parties to the instrument had intended it to be a mortgage.

Remanded with directions.

1. Evidence ⇨271(16)

Where intent is material element of disputed fact, declarations of decedent, made after as well as before alleged act that indicate intent with which he performed act are admissible in evidence as exception to hearsay rule, and it is immaterial that such declarations are self-serving.

2. Evidence ⇨269(2)

In action by administratrix to have decedent's deed, which was absolute on its face, declared a mortgage, income tax returns of decedent and testimony of decedent's widow and her son to effect that decedent had told them that he had given defendant a deed as security were admissible over hearsay objection to show intent with which instrument was executed.

3. Mortgages ⇨38(2)

A deed, absolute on its face, is what it purports to be, and clear and convincing evidence is required to justify court in finding that deed was intended to be a mortgage.

4. Appeal and Error ⇨1011(1)

The determination of trial court upon conflicting evidence as to whether deed was intended to be a mortgage is not open to review on appeal.

5. Mortgages ⇨38(1)

Evidence supported trial court's finding that deed, which was absolute on its face, was intended to be a mortgage.

6. Mortgages ⇨37(1)

In action to have deed, which was absolute on its face, declared a mortgage, letters between administratrix of grantor's estate and grantee after death of grantor, which letters were offered in support of plea of laches, were wholly immaterial to determination of basic question as to intent of grantor and grantee at time instrument was executed.

7. Appeal and Error ⇨1152

Fact that judgment declaring deed to be a mortgage and directing administratrix of mortgagor's estate to pay amount found to be due mortgagee did not specify period of time within which administratrix would be required to pay and within which administratrix would be entitled to reconveyance did not warrant reversal of judgment, but rather a modification thereof.

8. Appeal and Error ⇨1177(6)

Although it was within province of district court of appeal to make judgment declaring deed a mortgage more certain by modification thereof so as to state period of time within which administratrix of mortgagor's estate would be required to pay the amount found to be due mortgagee and upon which payment she would be entitled to reconveyance, the question of what would be a reasonable time for payment was more properly a question for the trial court, and cause would be remanded for determination of such question.

Percy Napton and Arthur C. Huston, Jr.,
Woodland, for appellant.

A. G. Bailey and John A. Young, Wood-
land, for respondent.

PEEK, Justice.

Plaintiff as administratrix of the Estate of Charles C. Schnepfe, brought this action in equity to have a deed, absolute on its face, declared to be a mortgage. From the judgment entered in her favor defendant appeals.

Decedent Charles C. Schnepfe had two brothers, the defendant George Schnepfe, and William J. Schnepfe who died subsequent to the execution of the deed in ques-

tion. Both George and William resided in Baltimore, Maryland. The deed which is here attacked was executed on July 22, 1933 by Charles as grantor to George and William as joint tenant grantees. It was delivered and recorded on August 16, 1933. At that time Charles was a widower, his first wife, Alfrida, having died on December 26, 1932. The property embraced within the deed consisted of approximately 423 acres of land, situated near Dunnigan in Yolo county. Seventy-three acres were planted to almonds, a portion of the remainder was planted to barley, and the balance was left for grazing. On June 1, 1934 Charles married Cordelia, the plaintiff administratrix. Charles died on April 19, 1941. William died on September 6, 1947. On June 20, 1950, plaintiff was notified by defendant to vacate the ranch premises on or before January 1, 1951. On October 6, 1950, plaintiff filed her action against George as the surviving joint tenant named in the deed. At the conclusion of the trial the court found that decedent's estate was indebted to defendant in the amount of \$10,000 and that upon payment of that amount, plaintiff was entitled to a reconveyance of the property. Judgment was entered accordingly. No time for payment was specified in the judgment, although in his memorandum opinion the trial court had ordered that a reasonable time be specified.

It would appear unnecessary to unduly lengthen this opinion to set forth in detail the numerous communications which passed between the decedent and his brothers, both prior to the execution of the deed in question and subsequent thereto, and which constitute the major portion of the evidence. A summary of the pertinent facts contained therein show that some time prior to May 1, 1933 Charles sought to obtain a renewal of a bank loan which originally was in the sum of \$17,000 but which had been paid down to \$8,000 and which was due on June 1, 1933. This covered approximately two hundred and sixty acres and included the area of the orchard. A second note in the sum of \$2,250, which covered the remaining acreage of the ranch, was not due until 1936. Because of

the additional cost that would be charged by the bank Charles sought to obtain the money from his brothers, suggesting that he would deed the property to them and upon repayment of the money lent they would deed the property back to him. It was George's suggestion that the property be deeded to himself and William as joint tenants, for the reason, as he commented in his letters, they would not only obtain ample security for the money advanced but also might avoid any possible trouble with Charles' nephews and nieces should he die prior to the repayment of the loan.

On December 18, 1933, the matter of the lease was raised in a letter from George to Charles wherein the amount of rent was set at \$800 per year for a period of three years. This sum was arrived at by computing the yearly taxes and insurance and seven per cent interest on the \$2,250 loan and five per cent on the \$8,000 loan. Charles' reply was that the only reason he would care for a lease was that if some fatal accident should occur to both George and William he would then have something to show his relatives. The lease described George and William as the co-owners with Charles in possession; that the owners desired him to remain in that possession until the end of the lease or until his death should it occur prior to that date. It also contained a provision for termination thereof upon repayment by Charles of the amount due.

During his lifetime Charles remained in possession of the premises, paying the taxes and insurance on the property, and after his death these items were paid by the administratrix up to January 1, 1951. In addition he planted numerous trees, up to one hundred or more in one year although such trees would not come into bearing for eight years or more. In addition he made major repairs to the dwelling house representing an expenditure in excess of \$1,000, repaired the barn at a cost of \$400, dug a well and installed a pump at a cost of \$800 and purchased and installed an almond huller at a cost of \$650. The total cost of these items was borne by Charles. Neither George nor William paid any part thereof nor was their permission

sought prior to the making of the improvements. During the period following the execution of the deed and at George's suggestion, Charles made several attempts to sell the property either in whole or in part. In one letter George suggested that if Charles could sell the property he would have ample money on which to live for the remainder of his life. The value of the property at the time the money was advanced by George and William was shown to be in excess of \$15,000 and immediately preceding the time of trial was appraised at approximately \$40,000.

In addition to the evidence above summarized the widow and her son were allowed to testify over objections to statements made by the decedent to them but out of the presence of the grantees to the effect that Charles had given his brothers a deed as security; that he was indebted to them in the principal sum involved; that he had made payments of interest to them and that he hoped to pay them in full. It is this testimony which is the basis of the first contention advanced by appellant.

[1] In the recent case of *Wilcox v. Salomone*, 118 Cal.App.2d 704, at page 712, 258 P.2d 845, at page 850 (hearing in the Supreme Court denied) this court was confronted with a like contention, and quoting from *Whitlow v. Durst*, 20 Cal.2d 523, 127 P.2d 530, we said:

"When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. * * *

"And in *Hansen v. Bear Film Co., Inc.*, 28 Cal.2d 154, at pages 173-174, 168 P.2d 946, at page 958, the court quoted the foregoing language from *Whitlow v. Durst*, with approval, and said further:

"Appellants contend that the trial court erred in admitting in evidence oral and written declarations of own-

ership of the stock and of the company made by Oscar, not within the presence or to the approved knowledge of Josephine, but subsequent to the transfers to her and in derogation of them. [Citing cases.] However, under well recognized exceptions to the hearsay rule, such declarations, made before, at the time of, or subsequent to the transfers, were properly admissible on the issue of delivery to Josephine (and it was found that the instruments were delivered to her), on the issue of a claimed gift, and also to show the intent or state of mind of Oscar.’”

[2] Viewing the attacked evidence in the light of the rule enunciated in the above authorities, we cannot say that the trial court erred in admitting testimony relative to such declarations. But if it were error to admit the same, again, as we said in the Wilcox case, we cannot say that it was prejudicial since much of the same was conceded in the letters from the defendant to Charles.

What has heretofore been said concerning the testimony of the widow and her son is equally applicable and likewise controlling as regards the admission of the income tax returns of the decedent.

[3,4] It is next contended that the evidence in support of the conclusion of the trial court was neither clear, satisfactory nor convincing. As defendant states, there can be no question but that a deed, absolute on its face, is what it purports to be, and that clear and convincing evidence is required to justify a court in finding that a deed was intended to be a mortgage. “But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide. [Citing cases.] In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal. [Citing cases.] As was said in this regard in *Wadleigh v. Phelps*, 149 Cal. [627], at page 637, 87 P. [93] at page 98, ‘the appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there

is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.’” *Beeler v. American Trust Co.*, 24 Cal.2d 1, 147 P.2d 583, 587.

[5] When the evidence as disclosed by the record before us is reviewed with the familiar rule in mind that we must indulge in all favorable inferences and presumptions in support of the judgment, we must conclude that the evidence was sufficiently clear and convincing to warrant the conclusion of the trial court.

[6] It is also contended that plaintiff is guilty of laches in that more than nine years elapsed before she obtained letters of administration and pursued decedent’s rights thereunder. In support of this contention defendant refers to correspondence between himself and plaintiff as an acknowledgment by them both that Charles was the owner of the property. He further relies upon correspondence relative to negotiations between himself and the United States Treasury Department concerning federal estate taxes, which correspondence was denied admission by the trial court on the ground that the same was hearsay. Whatever may have been the content of the letters between plaintiff and defendant after the death of the decedent was wholly immaterial to a determination of the basic question before the trial court: the intent of the defendant and the decedent at the time the deed was executed in 1933. Clearly the evidence relied upon by defendant could in no way affect that question.

Respondent concedes that defendant’s further contention that the judgment as entered is erroneous in that the court found that the interest on the principal was payable from the date of the signing of the findings, whereas the evidence, without conflict, shows that interest had been paid to January 1, 1950. It necessarily follows that the judgment should be so modified as to correctly reflect such fact.

[7] Lastly it is contended that the findings and judgment are subject to further attack for the reason that there is no period of time fixed within which plaintiff is required to pay the amount found to be

due defendant and upon payment of which amount plaintiff as administratrix of the estate of her deceased husband would be entitled to a reconveyance from the defendant. However, the failure to include such matters in the judgment does not warrant a reversal but rather a modification thereof. It appears from the order of the trial court directing counsel for plaintiff to prepare and submit findings and judgment that the court contemplated that the judgment would contain the specifications above mentioned. However, such procedure was not followed and the final judgment as entered contained no such provisions.

[8] Although it is within the province of this court to make the judgment more certain by modification thereof, *Cohn v. Cohn*, 1 Cal.2d 313, 34 P.2d 1000, it would appear that what is a reasonable time for payment is more properly a question for the trial court to determine after a consideration of the facts of this particular case. *Bloom v. Bloom*, 207 Cal. 70, 276 P. 568.

For the foregoing reasons the cause is remanded to the trial court to correct its findings and modify the judgment in accordance with the views herein expressed; otherwise the judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



120 Cal.App.2d 469

PEOPLE v. ORTEZ.

Crim. 2413.

District Court of Appeal, Third District,
California.

Sept. 29, 1953.

Defendant was convicted of statutory rape. The Superior Court, Modoc County, A. K. Wylie, J., entered judgment, and defendant appealed. The District Court of Appeal, Peek, J., held that where an uninterrupted series of acts by defendant began in county where defendant was tried and continued

until offense was completed, fact that some of the acts may have taken place in another county would not prevent jurisdiction being in county of trial.

Judgment affirmed.

1. Criminal Law ¶112(1)

Where defendant's uninterrupted series of acts culminating in statutory rape began in county in which defendant was tried, and continued until offense was completed, fact that some of the acts may have taken place in another county would not prevent jurisdiction being in county of trial. Pen. Code §§ 261, subd. 1, 781.

2. Indictment and Information ¶132(1)

In prosecution for statutory rape, where information specified precise dates of violations, and where no offense was sought to be proved save those charged in information, trial court did not err in not compelling prosecution to elect date or dates upon which it relied for conviction. Pen.Code § 261, subd. 1.

3. Criminal Law ¶117(1)

Where district attorney, in cross examining defendant charged with statutory rape, asked if defendant had been previously convicted of felony, and defendant answered that it was a juvenile matter and his counsel objected to the question, and court, after examining record and ascertaining that defendant had been adjudged a delinquent child, informed defense counsel that the question would have no effect in weighing facts of case and would not be detrimental to defendant, after which district attorney withdrew question, district attorney was not guilty of prejudicial misconduct in asking such question.

4. Criminal Law ¶1159(4)

In prosecution for statutory rape, confusion as to dates on part of complaining witness did not render her testimony incredible as matter of law, where such confusion could be accounted for by her state of sub-normal intelligence. Pen.Code § 261, subd. 1.

Chas. Lederer, Alturas, Herbert P. Welch, Lakeview, Or., for appellant.

Edmund G. Brown, San Francisco, by Doris H. Maier, Deputy, Sacramento, for respondent.

PEEK, Justice.

By an information filed by the district attorney of Modoc county defendant was charged with three counts of violation of section 261(1) of the Penal Code, to-wit: statutory rape. Count one charged the commission of the offense on January 5, 1952; count two charged a like offense on January 8, 1952, and count three charged the same offense on January 9, 1952. Following his plea of not guilty to each of the counts charged and his waiver of his right to trial by jury, the trial proceeded before the court, and at the conclusion thereof defendant was found guilty on count one and not guilty as to counts two and three. His application for probation was denied and he was sentenced for the term prescribed by law.

He now contends: (1) That the record contains no proof of venue; (2) that the trial court erred in not compelling the prosecution to elect the date or dates upon which it relied for conviction; (3) that the district attorney was guilty of prejudicial misconduct in his cross-examination of the defendant, and (4) that the testimony of the prosecutrix was inherently improbable. We find no merit in any of such contentions.

The evidence as disclosed by the record, when summarized in the light most favorable to the respondent, shows that the prosecutrix is the sixteen year old sister-in-law of the defendant. Her education terminated with grammar school which she completed only through the assistance of her instructors. However, she had acted as Mexican interpreter for the Draft Board in her community. Without question she knew the difference between right and wrong and the meaning and consequence of her acts of intercourse with the defendant. She lived with her mother a short distance from the home occupied by her sister and the defendant. At about two o'clock on the afternoon of January 5, 1952 the defendant picked up the girl as she was

on her way to her place of employment, offering to teach her to drive if she would accompany him. He then drove to the Dorris reservoir located near the town of Alturas, where the act as charged was accomplished. He then returned to Alturas and left the complaining witness near her place of employment. He admonished her not to tell any one or she would be sorry. While the defendant and the complaining witness were in the vicinity of the reservoir they were observed by two men who had known both the defendant and the complaining witness for several years. A third witness testified to observing a car similar to defendant's near the reservoir at approximately the same hour. On April 30, 1952, following an examination by a physician, it was determined she was then pregnant. From his examination the doctor concluded that conception could have occurred within the month prior to January 23, 1952. The defendant, testifying in his own behalf denied any intercourse with the girl at any time, or that he had taken her to the reservoir site; and in support of his alibi presented evidence that he was working at a town approximately nineteen miles from Alturas on January 8 and 9. Regarding his activities on January 5 he stated that he had remained at home with his wife who was ill but that he did go down town from his home at approximately 2:30 o'clock on that afternoon. In this he was corroborated by his wife. He also denied that he had taught the girl to drive his car or that she had ever driven it while he was with her.

[1] Counsel for defendant has argued at length concerning the lack of evidence that the crime was committed in Modoc county since the record, as he contends, is devoid of evidence as to the exact location of the Dorris reservoir. Whether or not the location of the reservoir was a matter concerning which this court could take judicial notice is a question wholly immaterial to a determination of the issue raised. See *People v. Harkness*, 51 Cal.App.2d 133, 124 P.2d 85. The testimony of the prosecuting witness was that the defendant invited her into his car in the city of Alturas. Thus

the initiation of the offense took place there. Under Penal Code section 781 even though the actual commission of the offense was performed in some other county the prosecution could properly have been in either county. Here the record shows without contradiction that an uninterrupted series of acts by defendant began in Alturas and continued until the offense was completed. Therefore the fact that some of the acts took place in the vicinity of the Dorris reservoir, even if it be assumed that it was located in another county, would not prevent jurisdiction being in the Modoc county court. *People v. Rodriguez*, 100 Cal.App.2d 549, 552, 224 P.2d 49.

[2] Although the information specified the precise dates of the violations of the charges it is defendant's next contention that the court should have granted his motion to compel an election of dates by the prosecution. No offense was sought to be proved save those charged in the information. He had full opportunity to, and did avail himself of, his right to present his alibi. Obviously the court was impressed with such defense and he was acquitted of the crimes charged in counts two and three and convicted only for the one offense charged on January 5, 1952. As regards that offense there was corroboration of three disinterested witnesses who observed the defendant and the prosecutrix in the vicinity of the Dorris reservoir. The record contains no evidence contradicting her testimony that he was the only person with whom she had been intimate. Thus the proof of the act committed on January 5 was not at variance with the proof of that act as charged in count one of the information.

[3] Defendant next contends that the district attorney committed prejudicial misconduct when he asked defendant on cross-examination if he had been previously convicted of a felony. Defendant answered that it was a juvenile matter and his coun-

sel objected to the question. The court thereupon examined the record and ascertained that the defendant, although guilty of burglary in Texas in 1937, had been adjudged a delinquent child. Counsel for defendant was then informed by the court that such question would have no effect in weighing the facts of the case and would not be detrimental to the defendant. The district attorney thereupon withdrew the question. There is no showing whatsoever that the district attorney was proceeding in bad faith in his question or that the defendant was so prejudiced thereby as to warrant this court in interfering with the judgment of the trial court.

[4] His last contention is that the complaining witness' story was inherently improbable. In support of such contention he has reviewed at length the confused and contradictory statements made by the prosecutrix concerning events during the months of December and January, the condition of the weather, the condition of her clothing, and her identification of certain county roads. However, taken as a whole her testimony does not appear to be subject to the attack made upon it. *People v. Harkness*, supra, 51 Cal.App.2d at page 140, 124 P.2d 85. Mainly her confusion was as to the dates which was undoubtedly accounted for by her unfortunate state of subnormal intelligence. Her testimony as to the fact of intercourse was corroborated by medical testimony. She designated January 5 as one of the dates and this was corroborated by independent evidence. Except, then, for the discrepancy noted, her testimony was satisfactory. Such confusion or discrepancy was not such as to warrant our conclusion that her testimony was incredible as a matter of law. *People v. Stangler*, 18 Cal.2d 688, 117 P.2d 321 and *People v. Harkness*, supra.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

120 Cal.App.2d Supp. 912

RICKER v. ROMBOUGH.**Civ. A. 75.**

Superior Court, Appellate Department,
Alameda County, California.

Sept. 17, 1953.

Action for rent on rent acceleration clause in lease and cross-action on open book account. The Municipal Court of the Oakland-Piedmont Judicial District, Joseph A. Murphy, J., rendered judgment for plaintiff and defendant appealed. The Superior Court, Appellate Department, Ralph E. Hoyt, J., held that provision in lease of real property for rent acceleration upon breach of a covenant to pay rent is unenforceable and void, as being either an agreement for liquidated damages when the damages are readily ascertainable or a penalty.

Judgment for plaintiff reversed and cause remanded for new trial, and judgment for cross-defendant affirmed.

1. Damages ⇐79(5)

Where the damages resulting from a breach of a lease are readily ascertainable, a provision for liquidated damages is to that extent void. Civ.Code, §§ 1670, 1671, 3302.

2. Damages ⇐80(1)

A provision in a contract requiring payment of a specified sum of money, without reference to actual damages sustained, for the breach thereof is a "penalty" and therefore unenforceable. Civ. Code, § 3302.

See publication Words and Phrases, for other judicial constructions and definitions of "Penalty".

3. Damages ⇐79(5)

A provision in lease which authorized lessor, upon any default of lessee, to terminate lease and re-enter the premises, and at same time sue for all unpaid rent reserved for the entire term of the lease, was unenforceable and void as being either an agreement for liquidated damages when damages were readily ascertainable or a penalty. Civ.Code, §§ 1670, 1671, 3302.

4. Damages ⇐76

Validity of a liquidated damage clause of lease is to be determined at the time

lease is entered into. Civ.Code, §§ 1670, 1671, 3302.

Philip S. Ehrlich, Albert A. Axelrod and Irving Rovens, San Francisco, for appellant.

David K. Gilmore, Oakland, for respondent.

HOYT, Judge.

This appeal involves the validity of a clause in a lease of real property providing for the acceleration of rent payments for default in payment of rent or violation by the tenant of any of the terms or conditions of the lease or in the event the premises are vacated by the tenant.

Respondent leased certain premises to appellant for a term of three years commencing on November 26, 1950, at a total rental of \$2,700, payable in monthly installments of \$75 on the 26th day of each month during the term of the lease, which contains the following conditions: "This lease is made upon the express condition that if default be made in the payment of the rent above reserved, or any part thereof, or if lessee fails or neglects to perform, meet or observe any of lessee's obligations hereunder or if lessee shall abandon or vacate said premises, lessor or the legal representative of lessor at any time thereafter without notice or demand, may lawfully declare said term ended, and re-enter said demised premises, * * *.

"Lessor may likewise at lessor's option and in addition to any other remedies which lessor may have upon such default, failure or neglect, give to lessee written notice of such default, failure or neglect and advise lessee thereby that, unless all the terms, covenants and conditions of this lease are fully complied with within thirty (30) days after the giving of said notice, the entire amount of rent herein reserved or agreed to be paid and then remaining unpaid shall immediately become due and payable upon the expiration of said thirty days and unless all the terms, covenants and conditions of this lease are fully complied with by lessee within said thirty days

the whole of said rent shall immediately become due and payable upon the expiration of said thirty days without further notice to lessee."

Appellant defaulted in the payment of rent due on September 26, 1951, he having previously vacated the premises during the month of July of that year. At the time of the trial of this action respondent had retaken possession of the premises and was endeavoring to relet them. The trial court gave judgment in favor of respondent for the total amount of unpaid rent reserved in the lease, namely, \$1,797.83.

Appellant urges that the acceleration clause in the lease is void as a penalty and as an agreement for liquidated damages in violation of Section 1670 of the Civil Code. In support of his position that rent acceleration clauses in leases of real property are valid, respondent relies upon the cases cited in the annotations to be found at 58 A.L.R. 300 and 128 A.L.R. 750, and upon the further grounds that rent acceleration clauses are similar to acceleration clauses in promissory notes, the validity of which is unquestioned, and that since the parties could, in the first instance, have contracted for the payment in advance of the entire amount of rent reserved they have a right to contract that the entire amount of rent reserved shall be payable upon the happening of any contingency.

The cases cited in the A.L.R. annotations, supra, afford little help in this situation for the reason that none of them refer to any statutory law such as Sections 1670, 1671 and 3302 of our Civil Code and in these cases the courts' views concerning penalties are not in accord with the California decisions on the subject. The A.L.R. annotations cite cases from Pennsylvania, New York, Louisiana, Kansas, Alabama and South Carolina.

In Pennsylvania such provisions are valid even though they "are in the nature of penalties". *Moretti v. Zanfino*, 127 Pa. Super. 286, 193 A. 106, 108.

The New York cases cited hold that clauses providing for acceleration of rent payments upon default in the payment of rent are valid provided there is no provision for acceleration for other defaults but

that if such a clause provides for acceleration of rent payments for other breaches, in addition to the failure to pay rent, the provision imposes a penalty and is void. *884 West End Ave. Corporation v. Pearlman*, 201 App.Div. 12, 193 N.Y.S. 670; *Bel-nord Realty Co. v. Levison*, 204 App.Div. 415, 198 N.Y.S. 184.

Louisiana, without reference to any statute such as we have in California and without considering whether such clauses are penal in nature, holds provisions for acceleration of rent payments upon violation of any condition of the lease "are lawful and are binding upon the parties." *Shepard Realty Co., Inc., v. United Shoe Stores Co., Inc.*, 193 La. 211, 190 So. 383, 388.

The Alabama cases permit the enforcement of rent acceleration clauses provided the tenant is allowed to remain in possession but make no reference to the question of whether such a provision is a penalty and no reference to any statutory provisions on the subject. *Maddox v. Hobbie*, 228 Ala. 80, 152 So. 222; *H. M. Price Hardware Co. v. Meyer*, 224 Ala. 35, 138 So. 543.

The Kansas case cited, *Erickson v. O'Leary*, 127 Kan. 12, 273 P. 414, 415, disposes of the contention that the rent acceleration clause under consideration "is in the nature of a penalty as distinct from liquidated damages" with a quotation from 17 C.J. 933: "* * * a penalty is in effect a security for performance, while a provision for liquidated damages is for a sum to be paid in lieu of performance." See, also, 25 C.J.S., *Damages*, § 101. And the comment, "There is nothing in the record to indicate that plaintiff's damages were less than the stipulated rent."

In the South Carolina case cited, *Gentry v. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63, 65, 128 A.L.R. 743, the court, in discussing a rent acceleration clause said: "The question thus presented is an interesting one and of novel impression in this state * * *

"* * * While this clause might not be considered unconscionable we think it may be justly and reasonably construed as in the nature of a penalty and thus so far enforceable as to support a cause of action in

favor of the lessors against the lessee for the actual damages sustained, the measure of which must be affected by the duty of minimizing damages, especially since the removal by the lessee had the effect of restoring the possession of the premises to the lessors. * * * Manifestly the lessors in the instant case could not claim that they were entitled to the full amount of the rent for the remainder of the term of the lease and also the right to the possession of the premises."

Decisions from other jurisdictions not based upon code sections similar to ours have little persuasive value in a situation such as this. "In states like California, however, which have code sections governing the matter of liquidated damages, the courts can not disregard the plain provisions of the statute." *Rice v. Schmid*, 18 Cal.2d 382, 387, 115 P.2d 498, 500, 138 A.L.R. 589.

While the appellate courts of this state have not specifically passed upon the validity of rent acceleration clauses in leases of real property, they have clearly established the principles to be applied in determining the validity of such a provision.

[1] Where the damages resulting from the breach of a lease are readily ascertainable a provision for liquidated damages is to that extent void. Civ.Code, Secs. 1670 and 1671; *Knight v. Marks*, 183 Cal. 354, 191 P. 531; *Knight v. Marks*, 66 Cal.App. 593, 226 P. 931; *Servais v. Klein*, 112 Cal. App. 26, 296 P. 123.

The damages resulting from the breach of a covenant to pay rent are readily ascertainable. "The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon." Civ.Code, Sec. 3302. In *Knight v. Marks*, 183 Cal. 354, 357, 191 P. 531, 532, the Supreme Court said: "Where the lease has not expired and a forfeiture and restitution is not sought, the measure of damage for a breach of the covenant to pay the rent fixed by the lease is the amount of the rent unpaid and no more. It could not be difficult or impracticable to fix the damages in such a case. It was a breach of an obliga-

tion to pay money only, and the damages were 'the amount due by the terms of the obligation, with interest thereon.' Civ. Code, § 3302." In *Jack v. Sinsheimer*, 125 Cal. 563, 566, 58 P. 130, 132, the Court held that "When a tenant fails to pay rent as provided in the lease, the amount of damage is not extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage."

[2] A provision in a contract requiring the payment of a specified sum of money, without reference to the actual damage sustained, for the breach thereof is a penalty and therefore unenforceable. In *Dyer Bros. Golden West Iron Works v. Central Iron Works*, 182 Cal. 588, 592, 189 P. 445, 446, it is stated: "While the terms by which the parties designate the sum decided upon are to be considered in ascertaining the purpose and intent in stipulating the amount to be paid in case of a breach, such terms are by no means controlling, and, even though the term 'penalty' is used, it must be ascertained from a consideration of the nature of the agreement whether there was an actual intent to prescribe a penalty; that is, *an intent to determine and define the liability in the case of a breach of the contract without any reference to the actual damage likely to be sustained.*" (Italics ours.) The decision in *Anaheim Citrus Fruit Association v. Yeoman*, 51 Cal.App. 759, 761, 197 P. 959, 960, contains the following: "Aside from any provisions of statute, it has long been held under decisions having their basis in the common law that a contract is not enforceable where a sum of money as a penalty is provided to be paid in the event of a breach, and where the sum fixed has no reference to, and finds no support in, the amount of actual damage sustained by the complaining party." In *Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish*, 37 Cal.2d 16, 21, 230 P.2d 629, 632, the following appears: "'A penalty need not take the form of a stipulated fixed sum; any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty.' *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 499, 2 P.2d 776, 777." In the recent

case of *Atkinson v. Pacific Fire Extinguisher Co.*, 40 Cal.2d 192, 197, 253 P.2d 18, 23, the Supreme Court again refers to the fact that a penalty bears no reasonable relationship to the loss sustained in these words, "To hold that the parties have not entered into a valid contract for liquidated damages, it would be necessary to construe the agreement as one for a penalty wherein the amount agreed upon bore no reasonable relation to the losses the parties considered might be sustained."

The U. S. Circuit Court of Appeals in *Moore v. Investment Properties Corporation*, 9 Cir., 71 F.2d 711, 712, 713, 719, held that, under California law, a clause in a lease giving the lessor the option in the event of a default in the payment of rent to re-enter upon the premises and "in such an event the Lessee shall pay to the Lessor the difference between the reasonable rental value of said premises for the balance of the term hereof at the time of such re-entry, and the rental and other sums to be paid to the Lessor by the Lessee hereunder during the balance of the term hereof" was invalid under Sections 1670 and 1671 of the Civil Code. In this connection the Court stated: "The measure of actual damages is fixed in California as the difference between the rent reserved in the lease and the rent received by the landlord after forfeiture, provided he proceeds in good faith and with diligence to relet the premises for and on account of the tenant. Two recent cases in California have stated the well-settled rule, *Phillips-Hollman, Inc., v. Peerless Stages, Inc.*, 210 Cal. 253, 291 P. 178; *Treff v. Gulko*, 214 Cal. 591, 7 P.2d 697. It seems reasonably clear without resort to decisions of the California court other than those bearing upon the general proposition as to the validity of provisions for liquidated damages under the two Code sections quoted, that we have in the case at bar an attempt to substitute an agreement for liquidated damages for a certain and definite measure of damages fixed by the law providing for an amount readily ascertainable at the end of the term by subtracting the rent received from the rent reserved."

[3,4] From the foregoing it follows that a provision in a lease of real property for rent acceleration upon breach of a covenant to pay rent is unenforceable and void as being either an agreement for liquidated damages when the damages are readily ascertainable or a penalty. This is particularly true in this case for the reason that the lease here under consideration expressly declares the rent acceleration clause to be "in addition to any other remedies which lessor may have upon such default, failure or neglect." Under this lease, upon any default of the lessee, the lessor has the right to terminate the lease and re-enter the premises and at the same time sue for all of the unpaid rent reserved for the entire term of the lease. Such a provision has no relation whatever to the actual damages which may be sustained and is the clearest kind of a penalty. The validity of a liquidated damage clause is to be determined at the time the lease is entered into. *Hanlon Drydock, etc., Co. v. W. McNear, Inc.*, 70 Cal.App. 204, 232 P. 1002; *Better Food Markets, Inc., v. American District Telegraph Co.*, 40 Cal.2d 179, 253 P.2d 10; *Atkinson v. Pacific Fire Extinguisher Co.*, *supra*.

Respondent urges that rent acceleration clauses in leases are similar to acceleration clauses in promissory notes, the validity of which is, of course, unquestioned. We cannot agree that these two types of clauses are similar. In leases the tenant pays rent for the possession and use of the property leased. In promissory notes the borrower pays interest for the possession and use of the money loaned. For an acceleration clause in a note to be similar to a rent acceleration clause in a lease it would have to provide that upon default all of the interest agreed to be paid should become immediately due and payable. Note acceleration clauses provide for acceleration of the payment of the principal sum loaned not for acceleration of interest. Concerning a similar contention made in *Gentry v. Recreation Inc.*, *supra*, 7 S.E.2d at page 65, the Court said: "The view taken by appellant is that such a clause is effective for this purpose because, among other things, it is

a well-established principle that if a debt is payable in installments it is perfectly legal to provide that upon failure to meet any installment, or in certain other contingencies, the entire amount of the debt shall become immediately due and payable. There is, however, quite an obvious difference between the acceleration of an ordinary debt and the acceleration of rent. In the case of an ordinary debt the debtor has already received the entire consideration, either in money or in property, while in the case of rent an acceleration would require him to pay for that which he has not yet received."

Finally respondent argues that since the parties could in the first instance have contracted for the payment in advance of the entire amount of rent reserved, they have a right to contract that the entire amount shall become payable upon the happening of any contingency. This is a non sequitur. This reasoning, in effect, says that since in the instant case the parties could have agreed that the rent would be \$150 per month they could provide that for breach of the covenant to pay rent the rent should be doubled. Under the cases heretofore cited, obviously this would be a penalty.

Appellant also makes the point that the notice of default given in this case was insufficient. However, it is unnecessary to consider this point in view of our conclusion that the clause in question is unenforceable and void.

With his answer defendant filed a cross-complaint upon an open book account. The trial court upon conflicting evidence rendered judgment against cross-complainant. There is evidence to sustain this part of the judgment and, consequently, that part should be affirmed.

The judgment for plaintiff on his complaint is reversed and the cause is remanded for a new trial upon the issue of the amount of actual damage suffered by the lessor. The judgment against the cross-complainant on his cross-complaint is affirmed.

WAGLER, P. J., and LEDWICH, J., concur.

PEOPLE v. CALIFRO et al.

Cr. 2906.

District Court of Appeal, First District,
Division 1, California.

Oct. 1, 1953.

Rehearing Denied Oct. 16, 1953.

Hearing Denied Oct. 29, 1953.

Defendants were convicted of conspiracy to commit abortion and of committing abortions. The Superior Court, City and County of San Francisco, H. A. van de Zee, J., entered judgments of conviction and denied new trial motions and defendants appealed. The District Court of Appeal, Bray, J., held that the evidence warranted the convictions.

Affirmed.

1. Abortion ☞11

Conspiracy ☞47

Evidence warranted convictions for conspiracy to commit abortions and for committing abortions. Pen.Code, § 274.

2. Conspiracy ☞43(5)

Indictments charging that defendants during three years last past and prior to a given date conspired, and that thereafter and pursuant to said conspiracy they did certain acts, did not charge that conspiracy terminated on such date, and did not allege the overt acts to have occurred after termination of conspiracy, but fully informed defendant that conspiracy continued until given date and that overt acts occurred pursuant to conspiracy. Pen.Code, § 274.

3. Criminal Law ☞565

A charge in indictment that offense was committed can be proved by evidence showing that offense was committed within three years prior to filing of indictment even though indictment contains a mistake as to the particular day on which offense was committed.

4. Conspiracy ☞28

Under the statute, conspiracy to commit abortion is a crime. Pen Code, §§ 182, subs. 1, 5; §§ 183, 274.

5. Conspiracy ☞47

In prosecution for conspiracy to commit abortion, there does not have to be direct evidence of agreement between defendants to commit abortion but the agree-

ment can be inferred from the circumstances. Pen.Code, §§ 182, 274.

6. Conspiracy ⇨47

In prosecution for conspiracy to commit abortion, evidence that abortion arrangements were first made by the victims with one defendant and that following such defendant's instruction the victims were met by the aborter constituted sufficient evidence from which might reasonably be inferred an agreement of defendants to commit abortion. Pen.Code, § 274.

7. Criminal Law ⇨564(1)

That abortions and conspiracies to commit abortions took place in jurisdiction in which prosecutions were instituted was sufficiently disclosed by the acts of accomplice defendants taking place in such jurisdiction. Pen.Code, § 274.

8. Abortion ⇨11

Admissions and confessions of defendant charged with abortion and conspiracy to abort corroborated abortees. Pen.Code, §§ 274, 1108.

9. Abortion ⇨11

The testimony of each abortee showing identical method and design is corroboration of the other abortees. Pen.Code, §§ 274, 1108.

10. Criminal Law ⇨507(6)

An abortee is not an accessory or accomplice to the abortion. Pen.Code, §§ 274, 1108.

11. Criminal Law ⇨338(6)

In weighing testimony of abortee in prosecution for abortion and for conspiracy to abort, jury could consider promise of immunity given abortee. Pen.Code, §§ 274, 1108.

12. Abortion ⇨11

Criminal Law ⇨511(2)

The test of corroboration of an accomplice or of an abortee is whether evidence other than such testimony by reasonable inference connects defendant with the crime or whether it satisfies jury that accomplice is telling the truth. Pen.Code, §§ 274, 1108.

13. Abortion ⇨6

While pregnancy is no longer an issue in abortion prosecution, pregnancy is a cir-

cumstance which may be proved if it exists. Pen.Code, § 274.

14. Criminal Law ⇨369(1), 1169(11)

In prosecution for abortion and conspiracy to abort, testimony of arresting officer that defendant at time of arrest referred to a previous time when defendant had been picked up for abortion was inadmissible, but admission of such testimony was not prejudicial where the evidence in the case was so strong that it was not reasonable to assume that in the absence of such testimony the jury would have acquitted defendant. Pen.Code, § 274.

15. Criminal Law ⇨736(2)

In prosecution for abortion and conspiracy to abort, evidence raised question for jury as to whether defendant's confession was given free from inducement and reward. Pen.Code, § 274.

16. Criminal Law ⇨622(1)

The granting of separate trials to defendants is a matter in the discretion of the trial court.

Henry J. Kleefisch, Reed M. Clarke, Nathan C. Coghlan, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen. of Cal., David K. Lener, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendants Lena Califro and Andrew Mareck appeal from judgments of conviction of conspiracy to commit abortions and of committing abortions, and from the orders denying their motions for new trial.

Questions Presented:

1. Sufficiency of the indictments as to the conspiracy charges.
2. Sufficiency of evidence, particularly corroboration as to Lena.
3. The admission of evidence (a) of pregnancy; (b) reference to an abortion in 1939; (c) of Andrew's confession.
4. Correctness of the denial of Lena's motion for separate trial.

Record.

Two actions were consolidated for trial. In the first action the indictment charged Andrew Mareck, Alice Mareck (his wife), Lena Califro (his mother), and Elliot Toor (a druggist) in the first count, with the crime of conspiracy to commit abortion, in the second count with committing abortion on one Ann. Prior convictions of burglary, robbery and first degree murder were alleged against Andrew. In the second action, which did not include Toor, the indictment charged the other three defendants, in count 1, with conspiracy to commit abortion; in count 2 with abortion on one Sylvia; in count 3 with abortion on one Betty, and in count 4 with another abortion on Betty. The above mentioned prior convictions were again alleged against Andrew. Andrew denied all prior convictions. On motion of the district attorney, on of the prior burglary convictions was dismissed. Lena moved for severance and a separate trial. Her motion was denied. During the trial Alice changed her plea to guilty. The jury found all three remaining defendants guilty on all counts charged against them respectively. It also found that Andrew had suffered the prior convictions as alleged.

Evidence.

[1] The evidence of guilt of all defendants is overwhelming, and does not require setting forth in detail.

The Ann Count.

Ann testified that when she found that she was pregnant she went to Toor's drug store and talked to him about an abortion. He told her to see Lena, giving the address, and suggested that she return to him after seeing her. Ann went to Lena's home, and told her Toor had sent her and that she wanted an abortion. Lena stated one would cost \$300 or \$350, and that she could arrange it for that night or the next day; that it would take place outside of San Francisco. Lena made a long distance call. Lena then gave Ann a piece of paper with her name, "Dr. Lena," and phone number written on it, and asked Ann to phone her as soon as she had the money and could go. Ann returned to Toor and related her conversation with

Lena. Toor said that for \$20 he would give Ann pills which would abort. Ann paid Toor and received the pills. As they did not accomplish results, Ann returned to Toor in four or five days, and reported their nonsuccess. Toor then told her that she should go through with the abortion as planned by Lena. Ann called Lena, who told her to go to Marysville, taking a nightgown, slippers, robe and money, and that she would be met in front of the P. G. & E. building there by a woman to whom she was to identify herself.

As planned, Ann met Alice Mareck in Marysville. Alice took her across the street to an auto where Andrew was waiting. Andrew drove them to a house in Brown Valley, about 15 miles from Marysville, where Mrs. Mareck wrote down certain personal data obtained from Ann and was paid \$350. This writing was later found on the premises by the police. Mrs. Mareck led Ann to a room or porch in which there was a table covered with a sheet. Here Andrew performed the abortion. Ann remained in bed there over night. One Eppler corroborated Ann's testimony as to the first conversation with Toor and stated that he had taken Ann to Lena's house, using a diagram which he had made from Toor's directions as to the location of the place. He heard Toor make a phone call asking if it was all right for Ann to go to the house, although he did not hear any name mentioned on the phone. Inspector Nelder of the San Francisco Police testified he and other officers went to the Brown Valley house to arrest the Marecks. They told Mareck that they were there to arrest him, that they had spoken to a girl in San Francisco. Mareck said a girl had been there over the week-end but she came up to buy narcotics. Nelder said he was going to search the house for "the tools." Mareck said, "* * * 'I will give you the tools.'" He then led Nelder to a grip and in handing it to him said, "The tools are in here." The grip contained surgical instruments commonly used in performing abortions. Later Mareck told the officers that he aborted the girl, saying he received \$350 for doing it. At San Francisco Mareck signed a written confession to Ann's abortion.

Toor's story was that he had given Ann a prescription of ergoapiol after being authorized by a physician by phone to do so. He had given Eppler the address of Lena's home but only for the purpose of Eppler's seeing Thomas Califro, Lena's husband, an attorney, who was there sick, to obtain legal advice. Eppler admitted that Toor had referred him to Thomas for legal advice but stated that that was only part of the conversation.

Lena admitted that Ann had come to her home asking help in obtaining an abortion, but that she told Ann not to bother her as she did not wish to get mixed up in Ann's affairs. Lena's husband corroborated Lena's version of the visit. Lena admitted that the handwriting on the slip of paper containing her address and phone number which Ann testified Lena had given her, was in her own handwriting, but claimed that somebody had taken it out of the waste basket or some other place. Andrew testified that his wife, Alice, and another man were doing abortions, and that the bag of tools was put in his closet by her. He denied all.

The Sylvia Count.

Sylvia testified that finding herself pregnant she went to Lena's home and talked to her. Lena told her an abortion would cost not over \$500. Sylvia did not have the money with her. Lena said to bring it to the place where the abortion would be performed. Lena gave her directions to go to the Barrel Inn at Vallejo where she was to meet a girl named Alice. Lena gave her one of Mr. Califro's professional cards on which Lena wrote the phone number. Lena told Sylvia to phone on leaving Walnut Creek to let Lena know she was on her way. Following directions, Sylvia, together with another woman who was to go also, met Alice Mareck at Vallejo. The three of them then went by bus to Woodland. Sylvia paid Alice \$400. The other girl paid Alice \$500. At Woodland they were met by Andrew and driven by him in his car to either Yuba City or Marysville. In a house there Andrew performed the abortion.

The Two Betty Counts.

Betty testified that in February she went to see Lena at her home, told her she was

pregnant and asked if Lena could help her. Lena said "yes" and quoted a price of \$500. Lena gave her Mr. Califro's professional card on which Lena wrote the house address and phone number. The following week she returned, with her nightgown and slippers which Lena had told her to bring. She was taken upstairs where she changed into her nightgown. In another room, Andrew performed the abortion while she was lying on a billiard table. (Califro admitted that there was a billiard table in the house.) She paid Alice the money.

In August, being again pregnant, Betty phoned Lena, telling her so. Lena said that she would try to get hold of the doctor and told her to call back. Betty phoned the next day and Lena said she had contacted the doctor. Betty said she only had \$450. Lena said that he might do it for that. Lena told her to go by bus to Marysville and the doctor and Mary (Betty knew Alice as "Mary") would meet her there. At Marysville, Andrew and Alice met her, and took her to the house where the abortion was performed.

As to the Sylvia count and both Betty counts, Lena and her husband testified that they were not at the Califro home during any of the times testified to by the two women. Andrew denied aborting the women, claiming that his wife and the other man had rented a house in Yuba City and were performing abortions there.

1. The Indictments.

[2] A rather tenuous claim is made that the conspiracy counts in the two indictments do not charge crimes. The first indictment, first count, charges the defendants with conspiracy to commit abortion, committed as follows: Said defendants "during the three years last past and prior to the 12th day of January, A. D. nineteen hundred and fifty-two, * * * did willfully, unlawfully and feloniously conspire" etc. Then are alleged three overt acts, the paragraphs as to each overt act beginning: "That thereafter and pursuant to said * * * conspiracy" the particular act was performed. In the second indictment, first count, the conspiracy and four overt acts are alleged in the same

manner, except that the conspiracy is charged as during the three years last past and prior to the 15th day of February, 1951. Defendants contend that the overt acts are alleged to have occurred *after* the termination of the conspiracy. While perhaps the language used might have been clearer, it is clear that in saying that the defendants during three years last past and prior to a given date conspired, and that thereafter and pursuant to said conspiracy they did certain acts, the indictments are not stating that these acts occurred after the conspiracy was over. Defendants were fully informed that the conspiracy was charged to have continued until the given date and that the overt acts occurred pursuant to the conspiracy.

[3] Defendants contend that the crime of conspiracy as charged in the second indictment was never proved for the reason that the evidence shows that all of the overt acts alleged occurred after February 15, 1951. As stated before, the indictment charged that the defendants "during the three years last past and prior to the 15th day of February, A. D. nineteen hundred and fifty-one, * * * did * * * conspire, combine, confederate, and agree together * * *." The overt acts are charged as occurring thereafter and pursuant to the conspiracy. There is nothing in the indictment to indicate that the conspiracy terminated on February 15, 1951. Moreover, if as claimed by defendants, the evidence showed the conspiracy and overt acts did not occur until after February 15, 1951, the mistake in the date is unimportant. As said in *People v. Black*, 45 Cal.App.2d 87, 113 P.2d 746, it is immaterial upon what particular day any offense is charged in the indictment provided the evidence shows that the offense was committed within three years prior to the filing of the indictment. The evidence in our case shows that the formation of the conspiracies charged in both indictments and all acts connected therewith occurred within such a period. As to the contentions concerning the time charged in the indictments, the language in *Stern v. Superior Court*, 78 Cal.App.2d 9, 14, 177 P.2d 308, 311, is appropriate here. There

it was contended that the indictment charging an offense as occurring the same day as the finding of the indictment failed to show whether it occurred before or after the indictment was found. The court said: "This point borders on the frivolous and we refuse to dignify it with extended discussion."

[4] Defendants further contend that in California there is no such crime as conspiracy to commit an abortion. It is a little difficult to understand the contention made in this regard. Apparently defendants claim that abortion is not one of the crimes mentioned in section 182 of the Penal Code, the criminal conspiracy section. Section 183 provides that no conspiracies other than those mentioned in section 182 are punishable criminally. While abortions are not mentioned in that section specifically, section 182(1) includes all crimes, felonies and misdemeanors known to the law of this state. "The first point raised by appellant, that 'there is no such offense as conspiracy to commit the Crimes of Burglary and Grand Theft,' is fully answered by the decision in the case of *People v. Welch*, 89 Cal.App. 18, 264 P. 324." *People v. Head*, 9 Cal.App.2d 647, 648, 50 P.2d 832. Again, abortions would be included under section 182(5) which includes an "act injurious to * * * public morals * * *."

2. Evidence (a) *Sufficiency*.

[5,6] It is contended that as to Andrew and Lena there is no evidence of any agreement between them to commit abortions upon which a conspiracy could be predicated. There does not have to be direct evidence of such agreement—it may be inferred from other evidence—from the circumstances. Here the facts that the abortion arrangements were first made by the victims with Lena, and that following her instructions they were met by the aborter, constitute sufficient evidence from which such an agreement might reasonably be inferred. In the first *Betty* case the abortion took place at Lena's home and the price was paid Lena. It would be unrealistic and unreasonable to assume that Lena, Andrew and Alice did not have an agreement to commit abortions.

[7] It is unnecessary to consider at length the claim that no part of any of the crimes except the first Betty abortion took place in San Francisco. It is sufficient to point to the actions of Toor and Lena as accomplices, all of which took place in San Francisco.

(b) *Corroboration.*

[8-10] Section 1108 of the Penal Code requires corroboration of an abortee. See *People v. Wilson*, 25 Cal.2d 341, 346, 153 P.2d 720. So far as Andrew is concerned, in addition to other corroboration, his own admissions and confession establish ample corroboration. See *People v. Baker*, 25 Cal.App.2d 1, 3, 76 P.2d 111. The main contention is that there is not sufficient corroboration of the testimony of the abortees as to Lena. The testimony of Ann as to Toor's recommending Lena for abortion purposes, Toor's phone call to an unnamed person for permission for them to come, his giving them a map showing how to get to the Califro home, was corroborated by Eppler; the paper containing the phone number which admittedly is in Lena's handwriting, Lena's admission that Ann came to her home asking for an abortion, the card given Sylvia on which Lena wrote the phone number and a similar card given Betty (although perhaps the handwriting on this is not Lena's) constituted corroboration for all of them. Betty was operated on on a pool table in the Califro home which admittedly was there. How would she know there was a pool table if she had not been there? Then again the testimony of each abortee showing the identical method and design is corroboration of the other abortees. An abortee is not an accessory or accomplice to the abortion. *People v. Stone*, 89 Cal.App.2d 853, 869, 202 P.2d 333; see also *People v. Clapp*, 24 Cal.2d 835, 151 P.2d 237; *People v. Rhoades*, 93 Cal.App.2d 448, 451, 209 P.2d 33. That abortions were performed on each of the women and that each became badly infected because of the abortion are shown by the medical testimony as to their condition immediately after the abortions. When Lena was brought to the hospital where Ann was recovering from the abortion and Ann identified her,

Lena, who had denied knowing Ann, said to her: " * * * when you came to the house, you said you wanted somebody to help you, and I told you I did not know anybody that could help you?" Lena told Nelder that she had been to medical school in Europe, but denied writing "Dr. Lena" on the card which Ann testified Lena had given her. At the trial Lena admitted it was her handwriting. Her attorney conceded that it was.

[11,12] Defendants apparently contend that Ann's testimony should be disregarded because it was given under threat of prosecution. On cross-examination she stated that while she had not realized there would be any reason to prosecute her, she had been told that if she testified nothing would be done against her. At most this would constitute a promise of immunity, a matter which the jury could take into consideration in weighing her testimony. The test of corroboration of an accomplice (and no more is required of an abortee) is whether the evidence other than such testimony by reasonable inference connects the defendant with the crime or whether it satisfies the jury that the accomplice is telling the truth. *People v. Griffin*, 98 Cal. App.2d 1, 28, 219 P.2d 519. "In determining the sufficiency of the other evidence necessary to corroborate an accomplice, 'there are certain established legal principles that serve as guides. It must 'tend to connect the defendant with the offense,' but 'So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing by itself' entitled to but little consideration.'" [Citations.] The necessary corroboration may consist of inferences from the circumstances surrounding the criminal transaction. [Citation.] It need not establish the precise facts testified to by the witness whose testimony it supports. (Ibid.) It is not necessary that the corroborative evidence prove the defendant is guilty of the offense. [Citation.] Such evidence is sufficient if it connects the defendant with the commission of the crime in such a way as reasonably to satisfy the trier of fact that the witness whose testimony it supports is telling the truth. [Citations.]

* * * *"Whether the corroborating evidence by itself is as compatible with innocence as it is with guilt, is a question for the trier of fact, not for the reviewing court."* [Italics added.] [Citations.]" *People v. Kendall*, 111 Cal.App.2d 204, 210, 244 P.2d 418, 422." *People v. Wayne*, Cal. App., 256 P.2d 62, 68.

3. Admission of Evidence.

(a) *Pregnancy.*

[13] Prior to 1935 section 274 of the Penal Code defining the crime of abortion required that as an ingredient of the crime the victim actually be pregnant. This requirement was deleted from the statute in that year. Defendants contend that because pregnancy is no longer an issue under the statute it was prejudicial error for the court to deny their motion to exclude all evidence of pregnancy. Yet at the same time they contend there is no evidence that Lena knew of the pregnancies or acted with intent to produce miscarriages, which intent the statute requires. While pregnancy is no longer an issue, it is a circumstance which may be proved, if it exists. The motion was properly denied. As to Lena's knowledge and intent, the circumstances amply afford reasonable inferences thereof. Why would she send the women who wanted abortions to "Doctor" Andrew who performed abortions, after first making the financial arrangements with them, if it was not with the intent that they be aborted. Moreover, one of the abortions was performed at her home.

(b) *Reference to 1939 Abortion.*

[14] In describing the arrest of Lena, Inspector Nelder stated that after some conversation, he told her to come with him. Lena said, "'For abortion? I don't do any abortions.' I [Nelder] said 'This is the same as in 1939.'" Defendants' motion to strike was denied. Nelder then testified: "She said, 'This is the same as in 1939. The cops picked me up for abortion and I was innocent at that time like I am now' and she talked about that case." Again a motion to strike was denied. On what theory the prosecution claims this conversation to be admissible does not appear. Obviously

ly it was inadmissible and the motions should have been granted. However, in view of the strong evidence in the case it could not have been prejudicial. It is not reasonable to assume, that in its absence, the jury would have acquitted Lena.

(c) *Andrew's Confession.*

[15] Defendants contend that this confession should not have been admitted as the evidence demonstrates it was "not given free from inducement and reward." They base the claim on Andrew's testimony to the effect that when the officers came to his home at night to arrest him, he stated to Inspector Nelder that his wife was very ill (she was well enough two days later to come to San Francisco and surrender), the weather was inclement, and he insisted that his wife be not arrested. Nelder went to the phone, and, returning, told him that he had called the district attorney and he had told Nelder to use his own judgment. Then, as Nelder agreed not to arrest Alice in return for the confession, Andrew gave it.

Nelder denied any such statement by Andrew or that there was an agreement and stated that at the time of Andrew's arrest Andrew without any inducement admitted aborting Ann, giving the details. On returning to San Francisco Nelder stated to Andrew that the latter had formerly stated that he wanted to sign a confession. He then asked Andrew if he still wanted to do so and Andrew said he did. He was then asked if he wanted to write it in his own words or if he wanted Nelder to type it. Andrew then dictated the confession to Nelder and signed it when it was written.

The conflict between Andrew's and Nelder's versions of the circumstances of the confession was a matter for the jury to determine.

4. Separate Trial.

[16] Prior to trial Lena moved for a severance and separate trial on the ground, as set forth in her affidavit, that Alice had threatened to accuse Lena at the trial of the commission of the offenses charged unless Lena paid her a large sum of money; that Alice was under the protection of the police officers and had already, in order to

avoid punishment for her own guilt, accused Lena of such complicity to them; that Lena believed that at the trial Alice would testify falsely against her codefendants and that Lena could not have a fair trial joined at trial with Alice. The motion was denied. How this could constitute an abuse of discretion does not appear. The effect of Alice's testimony against Lena would be the same whether in a joint or separate trial. While Alice pleaded guilty during the trial she did not testify. The granting of separate trials is a matter in the discretion of the court. We can see no abuse of that discretion here. As said in *People v. Nasworthy*, 94 Cal.App.2d 85, 92, 210 P.2d 83, 88, "There was a common element of substantial importance in the commission of the conspiracy charged, and the act[s] with which" Lena was charged—"all involved one set of circumstances." Even in cases where certain evidence is admissible only against one defendant and not the other, it has been held that there is no abuse of discretion in denying the other a separate trial. *People v. Eudy*, 12 Cal.2d 41, 82 P.2d 359.

The judgments of conviction and the orders denying motions for new trials are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



120 Cal.App.2d 401

SKELTON et al. v. FEKETE et al.

Civ. 8234.

District Court of Appeal, Third District,
California.

Sept. 28, 1953.

Action by husband and wife against trucker and operator of trucking company for injuries received in collision between truck and automobile driven by wife, wherein plaintiffs also alleged that operator had

been negligent in selecting trucker as independent contractor. The Superior Court, Sacramento County, entered judgment on verdict against both the defendants, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where trucker, who, in owning his own line rig, had invested substantial capital, and who was free to employ rather than drive his own rig, agreed to haul lumber for trucking company from one point to another and to carry public liability insurance, and trucker was not bound to undertake another haul upon completion of one agreed to, trucker was an "independent contractor" and not an "employee" of company.

Judgment against operator reversed and judgment against trucker affirmed.

1. Master and Servant ¶5

An "independent contractor" is one who renders services for a specified recompense for a specified result, who, in rendering services, exercises an independent employment or occupation, and who represents his employer only concerning results of his work and not means whereby it is to be accomplished.

See publication Words and Phrases, for other judicial constructions and definitions of "Independent Contractor".

2. Master and Servant ¶1

Relationship of "master" and "servant" does not exist unless employer retains right to direct mode and manner in which the work shall be done.

See publication Words and Phrases, for other judicial constructions and definitions of "Master" and "Servant".

3. Master and Servant ¶5

A material and generally conclusive factor in distinguishing between status of independent contractor and that of employee is right of employer to exercise complete and authoritative control of manner in which work is done, and existence of such right of control, not extent of its exercise, makes the relationship that of employer and employee.

4. Master and Servant ¶315

Where one desires to obtain specified result, he is free to do so through employees subject to his direction and control as to their physical activities in aiding him

to bring about the desired result or he may contract for the accomplishment of that result by another, surrendering to such other all right to control him as to means and manner by which such other shall go about accomplishing the desired result, and, if he does so contract, he is not liable for uncommanded acts of such other, except where, among other things, he is charged with a nondelegable duty.

5. Master and Servant ☞315

If one, instead of working through his own employees, contracts with another to furnish him the desired result, he is not to be charged with seeking wrongfully to evade responsibility to those who may be injured by such other in performance of the work.

6. Automobiles ☞194(2)

Where trucker, who, in owning his own line rig, had invested substantial capital, and who was free to employ rather than drive his own rig, agreed to haul lumber for trucking company from one point to another and to carry public liability insurance, and trucker was not bound to undertake another haul upon completion of one agreed to, trucker was an "independent contractor" and not an "employee" of company.

See publication Words and Phrases, for other judicial constructions and definitions of "Employee".

7. Master and Servant ☞319

One who employs an independent contractor to do work which involves risk of bodily harm unless it is skillfully and carefully done is subject to liability for bodily harm caused by failure to exercise reasonable care to employ a competent contractor.

8. Master and Servant ☞330(2)

In proof of allegations of failure to exercise reasonable care in employing an independent contractor, general reputation may be shown if it is of such character that will warrant an inference of knowledge therefrom, and specific incidents of lack of care on part of contractor in pursuit of his business may be shown if they are sufficiently numerous and sufficiently proximate in point of time to warrant inference that any proper inquiry into matter on part of

proposed employer would have disclosed them.

9. Trial ☞110

Where plaintiff asked trucker, in action arising out of automobile accident, whether trucker had ever been involved in accident, and upon receiving negative answer adduced no other evidence upon the matter, even if such questions had been asked without any information whatever that acts inquired about involved any wrongful act on part of trucker, asking of such questions did not constitute misconduct in view of fact that plaintiff had sought an answer to these questions by pre-trial deposition, and trucker had refused to answer.

10. Appeal and Error ☞1048(4)

Evidence ☞207(4)

Witnesses ☞255(1)

In action by husband and wife against trucker and operator of trucking company for injuries received in collision between truck and automobile driven by wife, where plaintiffs also alleged that operator had been negligent in selecting trucker as independent contractor, admission of evidence concerning trucker's alleged pleas of guilty to violation of traffic laws and plaintiff's giving of data, which indicated that trucker had been guilty, for purpose of refreshing trucker's memory were not proper, but such error did not result in miscarriage of justice, and, therefore, did not constitute reversible error.

Taft, Wright & Hopkins, Vallejo, for Graffio.

Gerald M. Desmond, Sacramento, for Fekete.

Albert H. Mundt, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

On November 17, 1950, an accident occurred upon a public highway in Sacramento County involving a truck and trailer, then owned and operated by Vincent Graffio, and a passenger car driven by respondent Dorothy Skelton, wife of respondent John W. Skelton. Action was filed by re-

spondents against appellant Graffio and also against appellant Agnes Fekete doing business under the name of Segundo Trucking Company. We shall hereafter refer to her as Fekete. It appears that Graffio was hauling lumber for Fekete under a contract which Fekete says established the relationship of employer and independent contractor between them so that Fekete was not liable for Graffio's alleged tort. A jury returned a verdict of \$40,000 against both defendants and they have each appealed.

We shall first treat of the contention of appellant Fekete that there is no substantial evidence to support the finding of the jury that Graffio was her servant. In her opening brief Fekete has set forth in question and answer form all of the testimony bearing upon the relationship between herself and Graffio and respondents do not contend that the statement is not complete. The statement of testimony in question and answer form occupies more than 80 pages of Fekete's brief. We will state the testimony in narrative form, eliminating duplication. There were two witnesses, and in addition to their testimony there was in evidence the written contract which Fekete claimed to have been the one under which Graffio was operating.

Defendant Graffio testified as follows:

He owned the truck and trailer which on November 17, 1950, was involved in the accident. He was carrying a load of lumber which he had picked up at Susanville on the 16th. Doris Martin, manager for Fekete, had sent him for the load. On the morning of the 15th he had called her and inquired for hauling. He went to Fekete's office to get the manifests so he could receive the load. He signed a contract. (This contract was placed in evidence.) Doris Martin told him to bring the load back to Los Angeles and she would tell him what else to do with it. He had to come back to Los Angeles for these further instructions. On delivery of the manifests to the Lassen Lumber Company their employees loaded the rig and he receipted for the load. After the accident he called Doris Martin in Los Angeles and reported it. Lumber was on the side of the road and the patrol told him to move it off. He

called Doris Martin so she could send out another truck. He had instructions to report accidents to Fekete. Doris Martin told him to stand by. She sent Ollie Miller's personal truck. A hoister hired at Sacramento was used to pick up the load; he billed that charge to Fekete because he had no money to pay for it, but the charge came out of his earnings. He had done similar hauling for Fekete over a period of about nine months, beginning around April. During none of the period did he own more than one truck at a time and during that period he only hauled one load for others than Fekete. He had no other income except from hauling. When assigned to make the trip to Susanville he received his instructions at home. He had been told to call up as a load might be ready and when he did Mrs. Martin asked if he wanted to go to Susanville. His home is his place of business. If he doesn't have much to do he goes to the office of Fekete. If he didn't go on a particular morning and there was a load to pick up Mrs. Martin would call him. Most of the time he went to the office whether he had a haul for that day or not. When he had no haul he took care of his rig. He had an understanding with Mrs. Martin that he would report to the office every day when not on the road. There were quite a few others hauling for Fekete. He could not recall there ever was a meeting of these men called by Fekete during which they were given instructions and rules and regulations and he never worked under rules and regulations issued by Fekete or any one in charge there. They never told him how he should conduct himself on the road; no rules or regulations were issued by Fekete covering the activities of drivers. He received checks for hauls on the average of about once every two weeks, not necessarily on regular dates. When they would collect for a haul then they would give him a check. He would have followed, in relation to any of these hauling jobs, any instructions Doris Martin gave him. While on a trip if she had called him and told him to go some place else he would have to do it for the simple reason that he was out to get a load of lumber so he could make a living. If she had sent him to Su-

sanville and then called him and told him not to go to Susanville but to go to Redding he wouldn't have had to do it, but he would do it provided there was a load of lumber there for him.

Mrs. Doris Martin testified as follows:

She was the dispatcher for Fekete and took care of the office and engaged the truckers. The Segundo Trucking Company was a trucking company and hauled lumber almost exclusively. When she sent Mr. Graffio to Susanville she told him to go up there and pick up a load of lumber and return it to Los Angeles and she would give him further instructions as to what he should do with it at that time. Fekete owned one line rig, and 5 small Fords that handled lumber locally in Los Angeles. A line rig is one that goes on long hauls on an operation similar to that being engaged in by Graffio. Fekete's own line rig driver was paid 25% of the net haul and Fekete supplied the gas and oil. The driver was on Fekete's payroll and Fekete paid social security, withholding and compensation. When the line rig went for a load of lumber the driver came back to Fekete's office and then he took it out to its final destination under instructions. Graffio was paid 86¾ per cent of the net pay for the haul. He supplied his own gasoline and oil and his own truck and was paid whenever Fekete got a check for the load that he had hauled. Graffio was never on the payroll. Fekete never contributed for him to social security nor to the California unemployment benefits, nor carried compensation insurance on him, nor made income tax deductions from money paid him. Fekete had sub-hauler agreements with him. In April, 1950, these were oral agreements, roughly around a dozen, but after the first of June there were written agreements. There were approximately 70 sub-haulers, but not at one time. There were 70 different operators that owned their own trucks that hauled for Fekete, as many from time to time as there was use for. When the load was spilled in the accident she sent Ollie Miller with his truck to bring the load on to Los Angeles. She gave him no directions or instructions other than to tell him where the load was to be picked up and

where it was to be taken. Any directions or instructions given to Graffio or any other sub-hauler to report an accident would be for the reason Fekete was interested in the trucking business and in the cargo because responsible for it. They were not actually instructions to report accidents. It was just a common thing to notify them if there was an accident. For Fekete's own line rig there were different places where the driver could purchase gas and oil and such necessities, but the men who were sub-hauling, including Graffio, fueled wherever they wanted to and Fekete had no control over it. When Fekete's own line rig driver had no haul his time was his own, but he was to report to the office every morning or she would call him in. He signed no contracts, was paid once a week according to the trips he had made. He was paid for making repairs or cleaning the rig on an hourly basis. The sub-hauler contracts were prepared for the purpose of maintaining a record of trips as they related to a particular individual. Before written agreement forms were used there were oral agreements with sub-haulers, but they were to the same effect. Fekete never at any time called the sub-haulers together for discussions relative to the operation of the sub-hauling agreements, and never posted rules and regulations on the bulletin board governing their activities. The sub-hauler agreements with Graffio were a standard form. They were printed especially for such use and had been prepared by an attorney at Fekete's request.

The provisions of the written contract signed by Graffio when he appeared at Fekete's office before starting on his trip to Susanville may be summarized as follows: Graffio agreed to transport lumber by truck owned and operated by him from Susanville to Hollywood. He was to receive as compensation a portion of Fekete's gross receipts from the haul payable within 15 days after the merchandise had been delivered and weight tickets and delivery receipts from the customer had been returned to Fekete. Graffio agreed to maintain his vehicle in good condition and working order, to pay all operating expenses, including gasoline and fuel and wages of the driver,

to furnish tarps of sufficient size and weight to completely cover the load and protect it from storm damage and to furnish chains, binders and ropes. Graffio agreed to carry the merchandise to place of delivery and to be liable to Fekete and to the cargo owner as an insurer for any loss or damage to the merchandise transported. He warranted he would maintain insurance on the vehicle against public liability and property damage, fire and collision throughout the trip covered by the agreement. It was specifically agreed that the written document established a "contractual" relationship between the parties and that neither Graffio nor any of his agents or employees should at any time be considered employees of Fekete, but that Graffio should at all times be considered an independent contractor. Graffio agreed on request of Fekete to furnish certificates of insurance as evidence he had maintained in force such workmen's compensation, public liability and other insurance as he was required to carry under the laws of this state, and it was further agreed that Graffio should conclusively be deemed to be in exclusive control of the vehicle and equipment until all merchandise had been removed at destination; and that if he did not complete delivery Fekete could provide a driver and vehicle to complete such delivery to the consignee, the cost to be borne by Graffio and the driver so provided to be Graffio's employee.

[1-3] An independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished; and when the essential object of the employment is the performance of work the relationship of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the work shall be done. *Lillibridge v. Industrial Accident Comm.*, 4 Cal.App.2d 237, 239, 40 P.2d 856. An independent contractor is one who renders services for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which said result is accomplished. In dis-

tinguishing between the status of independent contractor and that of employee it is well established that a material and generally conclusive factor is the right of the employer to exercise complete and authoritative control of the manner in which the work is done. The existence of such right of control and not the extent of its exercise constitutes the relationship that of employer and employee. It has been said that no single circumstance is more conclusive to show this relationship than the right of the employer to end the service contracted for whenever he sees fit to do so. *Beugh v. Rogers*, 24 Cal.2d 200, 206, 148 P.2d 633, 152 A.L.R. 1043. "One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor, and a servant or agent. * * * It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to act." *Lillibridge v. Industrial Accident Comm.*, supra, 4 Cal.App.2d at pages 240, 40 P.2d at page 857 quoting from *Hillen v. Industrial Accident Comm.*, 199 Cal. 577, 250 P. 570. "It is important to distinguish between a servant and an agent who is not a servant, since ordinarily a principal is not liable for the incidental acts of negligence in the performance of duties committed by an agent who is not a servant. * * * The important distinction is between service in which the actor's physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants. * * * An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere

physical results. For the purpose of determining liability, they are both 'independent contractors' and do not cause the person for whom the enterprise is undertaken to be responsible." Restatement of Agency, Sec. 220, Comment on Subsection (1) c.

[4, 5] When one in the prosecution of his affairs desires to obtain a specified result he is free to do so through employees subject to his direction and control as to their physical activities in aiding him to bring about the desired result or, on the contrary, to contract for the accomplishment of that result by another, surrendering in the meantime to that other all right to control him as to the means and manner by which he shall go about accomplishing the desired result. If he does the latter he is not liable for the uncommanded acts of the contractor. There are of course exceptions to this rule as where the person so desiring a result is charged with a non-delegable duty, but we are not here concerned therewith or with other exceptions. If, instead of working through his own employees, he so contracts with another to furnish him the desired result, he is not to be charged with seeking wrongly to evade responsibility to those who may be injured by that other in the performance of the work. The problem of determining whether the status created by the arrangements made is that of employer and employee or that of principal and independent contractor is not to be approached from the standpoint that the law ought to cast upon the principal liability for injury to others in the prosecution of his affairs through independent contractors. The law gives the right to elect and the election having been honestly made liability is not to be fixed by distortions of a clear contractual status honestly created.

[6] Applying what we have said to the facts narrated and in the light of the contract between Fekete and Graffio it is clear that Graffio was not the employee of Fekete, but an independent contractor for whose negligent performance of contractual obligations Fekete was not liable. Graffio owned his own line rig, which ownership involved investment of substantial capital. This equipment he maintained and operated and with it engaged in an independent call-

ing which has become increasingly common as the growth of the State has made necessary a steadily increasing use of the public highways for the transportation of freight. He did not engage to drive this equipment himself when hauling loads for Fekete and he was free to employ a driver in his place if it suited his purposes from time to time to do so. The result he agreed to accomplish was a definite and concrete thing—the transportation of a load of lumber from point to point. With respect to that operation he undertook the usual obligations of a cargo carrier and so far as danger to the public was concerned through the operation of his equipment he undertook to carry public liability insurance. He was under no obligation, having completed a haul, to undertake another and was, in his relations to Fekete, but one of a great number of so-called sub-haulers from time to time rendering like service to her. It is immaterial that he chose, without obligation to do so, to confine his hauling to Fekete's needs rather than to freeboot about the state. This was a business policy he was free to adopt. As said in *Hammel v. Keehn*, 18 Cal.App.2d 387, 390, 63 P.2d 1165, 1166: "There was * * * no contract continuing from day to day, but only a practice under which new contracts constantly arose." See, also, *Clarke v. Hernandez*, 79 Cal.App.2d 414, 422-423, 179 P.2d 834. Clearly the contract upon its face was for the accomplishment of a definite result through means and methods completely under the control of Graffio and without any reserved right in Fekete to exercise any control thereover. If we turn to the testimony touching the relationship we find nothing from which can be inferred a relationship other than specifically provided for by the written agreement nor any acts of the parties inconsistent therewith, not even any interference with Graffio's methods. True, Graffio was asked what he would have done if while engaged in a haul he had received orders from Fekete to cease the performance of that contract and go to another place and haul other freight. But assuming that his testimony as to what he would have done in a purely supposititious situation would be competent proof as to

the relationship between him and Fekete, he made it clear that though he would have done as requested since he had a living to make, yet he would not have had to do it. Stress is laid upon the testimony that orders were given by Fekete's manager and dispatcher to Graffio, but these were no more than the usual orders that are given to any freight carrier as to point of origin and point of delivery—information necessary for the carrier to have if he is to perform his contractual obligations. There is no evidence that any order was ever given to Graffio even as to the route he was to follow, much less as to how his equipment should be operated. We think it unnecessary to labor the point further and that a consideration of the oral testimony and the written agreement demonstrates clearly that the relationship was that of principal and independent contractor and therefore that the judgment against Fekete is without substantial support and must be reversed.

We turn now to the appeal of Graffio. When this action was begun the complaint contained two counts, one in which Mr. Skelton was plaintiff and one in which Mrs. Skelton was plaintiff. Both counts contained allegations that at the time of the accident Graffio was operating his truck as the servant of Fekete. Trial to a jury resulted in a disagreement and thereafter the pleading was amended and the cause went to a second trial upon an amended complaint which contained an added count by each plaintiff alleging the following: That at the time of the accident Graffio was an independent contractor in so far as Fekete was concerned; that for a considerable period of time before he went on the trip which resulted in the accident he had been a reckless and negligent driver and that this fact was either known to Fekete or should have been known to her when she engaged him to make the haul. Although these counts so brought in by amendment purported to be against both defendants it is clear that as to Graffio they added no additional ground of liability and that they did add such a ground of liability as against Fekete. She was there being sued upon the theory that she herself had been negligent in selecting an independent contractor in

that she selected an incompetent one, that is, one who was such a reckless and incompetent driver that she might reasonably anticipate, knowing him to be such, that he might cause the very injuries sued for in this action and upon that ground she was liable for her own negligence. At the trial three special interrogatories were submitted to the jury: 1. Was Graffio at the time of the accident the employee of Fekete? 2. Was Graffio prior to the accident a negligent, careless and incompetent driver? 3. Was this either known by Fekete or of such degree that she should have known about it? The jury answered the first interrogatory by an affirmative finding that Graffio was the employee of Fekete. It did not answer the other interrogatories. Graffio in his appeal does not question that the evidence substantially supported the finding that on the occasion of the injuries sued for he negligently operated his truck, though it may be said that this evidence was sharply conflicting; but he urges that the court prejudicially erred in permitting questions to be asked him touching the cause of action based on the alleged negligence of Mrs. Fekete in selecting him as her contractor and that counsel for the plaintiffs was guilty of prejudicial misconduct and bad faith in the matter of these questions. He seeks reversal of a judgment which he contends was thus unfairly obtained. It appears that counsel for the plaintiffs, prior to bringing in his amendments to his pleadings, had obtained some information upon which he contends he was warranted in charging Mrs. Fekete with negligent selection. Before trial he sought to take the depositions of Graffio and of Mrs. Martin, manager for Fekete, and thereby to question Graffio concerning violations of the rules of safe driving which he believed Graffio to have been guilty of and to question Mrs. Martin as to what, if any, investigation Fekete had made concerning Graffio's competency as a truck driver. The witnesses had refused to answer questions of this sort and the matter had been reported to the court which had issued an order to them to show cause why they should not answer. The matter was at this stage when the cause came on for trial.

There was a pre-trial conference in the chambers of the trial judge, out of the presence of the jury panel, and with counsel present representing all parties. There the propriety of the questions was gone over and discussed, the limits of examination touching such matters was discussed and the trial judge informed counsel generally as to the conditions under which he would permit the questions to be asked and the limitations he would fix upon the examination of witnesses in respect thereto. It appears from the report of that meeting that counsel for the parties were at odds as to the legal sufficiency of the added counts and as to permissible methods of proof. Counsel for the plaintiffs took the position that he was entitled to prove his cause of action here under inquiry by calling Graffio to the stand as a witness and proving by specific instances of past misconduct that he was an incompetent driver; and then to prove directly, or by inference, that Fekete had or was charged with knowledge of such incompetence. There was much more in the discussions, but it is not necessary to state it here since we refer to the matter only to show that counsel on both sides, as well as the trial judge, had made considerable investigation as to what showing might properly be made upon examination of Graffio and of Mrs. Martin.

The trial proceeded and upon the matter we are now discussing Graffio was asked a number of questions, to which we will now give particular attention. He was asked if on February 10, 1948, in Los Angeles County, he had violated Section 475 of the Vehicle Code by "running a red light". He denied he ran the light. He was asked what did happen. He explained that an amber light came on when he was halfway through an intersection and when he had cleared a police officer gave him a ticket. Nothing further appears concerning this suggested violation. He was asked if on August 16, 1948, in Los Angeles County, he had violated the Vehicle Code "by running a red signal". In effect he admitted he had. He was asked if on October 7, 1948, in San Bernardino County, he had violated the code by passing on the right. He said he recalled no such incident. He was then

asked this question: "I may refresh your memory that you were arrested by the California Highway Patrol Officer Smith and you entered a plea of guilty in the Justice's Court in the County of San Bernardino for that offense?" He said he could not recall the incident. The matter was dropped there. He was asked if he had been involved in an accident on May 28, 1949 in the City of Pomona and he said that he had been and that his truck had collided with an automobile. Nothing further was adduced concerning this incident to show Graffio was at fault. He was asked if on December 6, 1949, in Los Angeles County, he had violated the code by carrying an unsafe load. He said he did not have an unsafe load, then proceeded to say that an officer had stopped him and told him he was supposed to have three chains instead of two on the load he was carrying under a law that had just gone into effect. He was then asked if he had entered a plea of guilty to such a charge in the Justice's Court and he stated he had. He was asked if on February 18, 1950, in Huntington Park he had violated the code by running a flashing red signal and if he had not been then arrested by Officer McBeaky. He explained that what he had said previously about running a red light on August 16, 1948, should be considered as about the incident of February 18, 1950, that being the only blinking light he could remember running through. He was asked again about the suggested incident of August 16, 1948. He said he could not recall it and counsel stated: "I might attempt to refresh your memory by stating that—asking you if you were not arrested by Officer Hoyt of the California Highway Patrol Number 796 on that date for that offense." He again stated he had no such recollection. He was asked if on April 28, 1950, in Kern County, he did violate the code by overloading. He said he had not really overloaded but "he said I was overloaded and he gave me an overload ticket for that but I don't think I was" overloaded. Counsel then asked if he had not gone to the Justice's Court of Kern County and entered a plea of guilty and he replied he had. He was asked if on August 26, 1950, in Soledad, he had exceeded the

speed limit with his truck. He said he didn't remember getting a ticket. Thereupon counsel said: "I might refresh your memory in that regard by asking you if you were not given a warning ticket by the Highway Patrol at that time?" He denied this. He was asked if on June 30, 1950, in Sacramento County, on Stockton Boulevard, he had violated the code by speeding with an excessive load. He replied he was not speeding and then went on to explain the incident during which a member of the patrol had given him a citation though he was not guilty. He was then asked if he had entered a plea of guilty of excessive speed at that time and he replied that "he paid the ticket". Asked if he had not gone "in to Judge Mix and entered a plea of guilty" he replied "I didn't go in; I mailed it in to him." He was asked if in September, 1950, in Los Angeles County, he had violated the code by driving at excessive speed. He said he had done so, but explained that he was approaching a steep grade, his motor was not functioning well and he picked up speed in order to make the grade, there being no traffic near. He was asked if he was involved in an accident in Bakersfield on July 30, 1950 and he denied that he had been, but explained that while he was stopped off the road a car had struck his truck. He was asked if on October 18, 1950, in Los Angeles county, he had violated the code by driving through a safety zone while making an improper left turn and he answered that he had. He was asked if on October 17, 1950, in Tulare, he had violated the code by excessive speed. He replied he got a speed ticket but did not deserve it. He was then asked if he went into court and entered a plea of guilty and he replied he mailed the fine in. He was asked if he had been involved in an accident on June 3, 1946, in Los Angeles, where a person was involved and he stated he could not remember such an incident. He was asked if at any time he had discussed the matters concerning which he had been questioned with either Mrs. Fekete or Mrs. Martin or any one in charge of Mrs. Fekete's business and he said he had not nor did he have knowledge that in any

other way they had become acquainted therewith.

Mrs. Martin testified that when she dispatched Graffio to Susanville on November 17, 1950 she made no inquiry as to whether or not he was a careful driver or had ever violated state laws in respect of driving and that she had not communicated with the Department of Motor Vehicles concerning his record there. Counsel for the plaintiffs then called a witness who was familiar with the records kept in the State Department as to violations by licensed drivers who stated that such records were kept, that they were public records and were open to inspection by any one who desired to investigate them. There was a clear understanding between all counsel and the court that all these questions were under objection. And at the close of the testimony proper and adequate motions to strike were made and denied.

[7-10] It is well settled that "One who employs an independent contractor to (a) do work which involves risk of bodily harm unless it is skillfully and carefully done, * * * is subject to liability for bodily harm caused by the failure to exercise reasonable care to employ a competent contractor." 2 Restatement of Torts, sec. 411; see, also, *Ozan Lumber Co. v. McNeely*, 214 Ark. 657, 217 S.W.2d 341, 8 A.L.R.2d 261, and the annotations appended to that report. It has been said also, and we think it is sound law, that in proof of allegations of such failure to exercise care general reputation may be shown if it is of such character as to warrant an inference of knowledge therefrom or that specific incidents of lack of care on the part of the contractor in pursuit of his business may be shown if they are sufficiently numerous and sufficiently proximate in point of time to warrant an inference that any proper inquiry into the matter on the part of the proposed employer would have disclosed them. *Ozan Lumber Co. v. McNeely*, supra, and annotation thereto. See, also, 2 Wigmore on Evidence, 3d Ed., secs. 249, 250, from which we quote the following: "Where by the substantive law an employer's liability for injuries done by his em-

ployee depends upon his selection of a competent employee, it is well settled in all jurisdictions that the *reputation of the employee* is receivable to show that the employee's character in respect to competency was *known to the employer*. * * * Since reputation is after all created originally by conduct, the use of reputation, for the purpose just noticed, gives also, by implication, a sanction to the probative value of particular acts of misconduct as giving warning of incompetency." But appellant contends that, assuming these rules to be sound and applicable to his case, nevertheless by combination of bad faith in the asking of questions without reasonable belief that they would produce evidence of misconduct and with the intent instead to prejudice him by the mere asking and by reason of alleged errors in the introduction of the testimony that was elicited he was prevented from having a fair trial. To examine these assignments it is necessary to consider the situation and the implications therefrom which obtained at the trial. It was apparent that counsel for the plaintiffs had such information as the records of the Motor Vehicle Department disclosed as to past misconduct of Graffio; and therefore had had opportunity to prove such violations if any by the direct testimony of competent witnesses thereto. It is counsel's duty at all times to conduct a trial fairly. When counsel asked if Graffio had been involved in an accident and on receiving a negative answer adduced no other evidence upon the matter it could be inferred that in preparing his case for trial he had ascertained that he would be unable to prove the suggested violations of law by any one other than Graffio and indeed in his brief counsel justifies his questioning of Graffio in that way by asserting that after all Graffio knew better than any one else whether or not he had been driving on the dates and at the places referred to and had been guilty of misconduct in relation thereto. We incline to the opinion that if counsel so situated had asked these questions, the prejudicial character of which cannot be disputed, without any information whatever that the acts inquired about involved any wrongful act of Graffio's he would be

fairly open to the accusations of unfair tactics and of seeking merely to blacken Graffio in the eyes of the jury. But it appears in this record that he had sought an answer to these questions by deposition and Graffio had refused to answer and so we think it cannot be said with any sense of conviction that counsel was in these instances guilty of misconduct. Graffio contends further that the court erred, and counsel was guilty of misconduct, in the introduction of evidence concerning pleas of guilty; that counsel had also been derelict in those instances where Graffio had denied fault or stated that he failed to recollect an incident and counsel had then offered to "refresh your memory" by giving data which indicated that counsel had information that Graffio had been guilty as suggested. It was error on the part of the court to admit evidence as to pleas of guilty. Counsel for the respondents seeks to justify questions concerning Graffio's pleas of guilty by saying that he was not inquiring about convictions, but about pleas, which were admissible as admissions against interest made by Graffio. The trouble with that position is this: None of the testimony here under discussion was admissible against Graffio in proof of the only negligence charged against him, which was negligence in the matter of the accident out of which this action arose. And since plaintiffs were proceeding against Fekete upon the theory that Graffio was not her employee, but that she had been primarily negligent in selecting him as her independent contractor Graffio's admissions against his interest were not admissible against Fekete. 4 Wigmore on Evidence, 3d Ed., sec. 1076, p. 115. It was error, therefore, to permit these questions. And if counsel asked them in the knowledge that he had no right to do so he was guilty of unfair conduct. But we cannot on this record here justify a reversal for the reasons contended for, in view of the constitutional requirement that we may not reverse unless there has been a miscarriage of justice. We are not able to say that is so in this case. In addition to what has been said there are these further considerations: In several instances the references to the pleas of

guilty were volunteered by Graffio himself, and in considering evidence touching this examination of Graffio the jury were under the admonition of the court, given before the testimony was received and again before the cause was submitted, that they were not to consider any of these matters in determining whether or not Graffio had in the instant case been guilty of negligence. Undoubtedly these matters were argued to the jury and while we cannot condone all that was done, neither can we say that after an examination of the entire cause, including the evidence, we are of the opinion that the errors complained of and the conduct of counsel have resulted in a miscarriage of justice.

The judgment rendered against Agnes Fekete is reversed. The judgment against Vincent Charles Graffio is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; CARTER, J., dissenting.



120 Cal.App.2d 458

BERTRAM v. DANISH CREAMERY ASS'N.

Civ. 8168.

District Court of Appeal, Third District,
California.

Sept. 29, 1953.

Action by member of creamery association, who had delivered surplus grade "A" milk to the association and who, pursuant to resolution of board of directors, had been paid at grade "B" milk prices, for alleged balance due him, and upon open book account arising out of the transaction. The Superior Court, Madera County, Stanley Murray, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Peek, J., held that the resolution in question was a proper exercise of the powers of the board of directors in the management of the affairs of the association.

Affirmed.

1. Agriculture 6

Where nothing in by-laws, articles, or any contract bound creamery association to take, or any member of association to deliver, any milk, association was free to deal with its members on any reasonable basis, and in so doing could apply different conditions of purchase as to members, if, in interest of association, there existed reasonable and natural grounds for such varying conditions.

2. Agriculture 6

Where by-laws of creamery association gave board of directors control of business and, as a necessary adjunct of such power, board could make any and all rules and regulations necessary for successful operation of association, which rules and regulations were not inconsistent with by-laws or laws of the state, resolution providing that members who delivered surplus grade "A" milk to association would be paid for grade "B" milk was a proper exercise of board's powers.

Matt Goldstein, Hansen & Hansen, Fresno, for appellant.

Dearing, Jertberg & Avery by Gilbert A. Jertberg, Fresno, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment of nonsuit. Two causes of action were alleged in plaintiff's complaint, one for an alleged balance due to him for milk delivered to defendant, and the other upon an open book account arising out of the same transaction.

The evidence produced by plaintiff in support of his complaint shows that he has been a member of defendant association in good standing since November 1935. He is a producer of Grade "A" milk which he distributes by means of delivery routes to retail customers in the city of Chowchilla. All milk not necessary for his retail customers was delivered by him to the association. The defendant is a co-operative, non-profit marketing association organized under the laws of this state in December 1921. By its charter it is authorized, among other things, to buy, sell and deal in all

dairy products. Its by-laws set forth rules of eligibility for membership in the association, and provide that the business of the association shall not be carried on for profit to itself but it may conduct its business for profit to its members; that no member may hold more than one certificate of membership; that the voting power of each member shall be equal as shall be the property rights of each of the members of the association. In regard to the powers of the Board of Directors it is provided that all of its corporate powers, business and property shall be exercised, directed and controlled by its Board which shall have power to conduct and manage the business affairs of the association, and make rules and regulations not inconsistent with the laws of the state or by-laws of the association. No provision is made in either the articles or by-laws whereby the association obligates either the member to deliver or the association to accept any or all of the member's production of milk or milk products.

The action of the Board which gives rise to the present controversy was a resolution regularly passed wherein it was provided that "the management be instructed to notify all producers sending Grade 'A' as their surplus, that beginning January 1, 1950, their milk will be received as Grade 'B' milk." (Emphasis added.) Pursuant to this resolution the general manager of the association mailed to plaintiff a letter wherein he was informed that

"To conform with the established practice of paying manufacturing price for surplus milk received from Grade 'A' distributors, the Board of Directors at their regular meeting on November 22, instructed us to inform you that effective January 1, 1950, the manufacturing price will be paid for all milk which we receive from you. This milk will be used for manufacturing purposes.

"The action was taken to make uniform and offer to all like shippers the same payment plan.

"Very truly yours,

Danish Creamery Association"

Following the receipt of this letter plaintiff made no formal protest or otherwise com-

municated with the Board. However, at the trial he testified to a conversation with the president of the Board to the effect that the Board's action was discriminatory, was violative of his rights as a member to equal terms with that given to all other members; that he had the right to ship his milk to the association; that he would continue to ship his milk to the association and that he would attempt to collect for it. From January 1, 1950 to July 15, 1950 plaintiff continued to deliver his surplus Grade "A" milk to the association, and in accordance with said resolution was paid Grade "B" prices. He thereafter filed his complaint seeking to recover the balance alleged to be due. Defendant's answer admitted plaintiff's allegation concerning the rights of each member in the association and alleged affirmatively that there was nothing in the corporate charter or by-laws obligating either the members to deliver, or the association to receive, any milk or milk products, nor was there any separate contract between plaintiff and defendant establishing such obligations. At the trial the parties stipulated that there was no such agreement existing between the association and its members. The only testimony presented at the hearing was the testimony of plaintiff heretofore summarized. In addition three exhibits were introduced, plaintiff's certificate of membership in the association, its articles of incorporation and its by-laws. The letter notifying plaintiff of the change in policy was introduced as defendant's exhibit during the cross-examination of plaintiff. Upon this evidence plaintiff rested and defendant's motion for non-suit was made and granted.

Quoting from plaintiff's brief, two questions are raised by him on appeal.

"1. Was the resolution of November 22, 1949 violative of the rights of the plaintiff as a member of the defendant Association?

"2. Did the Court err in granting the defendant's motion for a nonsuit?

He argues in regard to the first question that "the resolution, in effect, created a group of members of the Association who were treated differently from other members delivering similar products to the As-

sociation and that this constituted an unfair and unlawful discrimination against the property rights of the plaintiff as a member of the Association."

[1] In view of the stipulation of the parties that there was no agreement between plaintiff and defendant, plaintiff, to maintain his action, had the burden of showing some right to continue to deliver and thereby force the association to accept whatever amount of milk he chose to deliver to it. However, the record shows that the successful operation of the defendant association was in no way dependent upon contractual obligations but to the contrary was predicated wholly upon a voluntary relationship between the association and its members. Thus it necessarily follows that since nothing in the by-laws, articles, nor any contract bound the association to take, or any member to deliver, any milk, the association was free to deal with its members on any reasonable basis; and in so doing could apply different conditions of purchase as to members where, in the interest of the association, there existed reasonable and natural grounds for such varying conditions. The association was not bound to treat each member exactly as it did all the others when to do so would be a detriment to the association. It may be conceded it could not unfairly discriminate but it could discriminate. *Mooney v. Farmers' Mercantile & Elevator Co.*, 138 Minn. 199, 164 N.W. 804.

[2] It remains then to determine whether the resolution under attack was a proper exercise of the powers of the Board of Directors in the management of the affairs of the association and if said resolution was in anywise unfairly discriminatory as to plaintiff. As previously noted, the by-laws gave to the Board the management and control of the business of the association and, as a necessary adjunct of said power, to make any and all rules and regulations necessary for the successful operation of the association not inconsistent with the by-laws or the laws of this state. We conclude that the resolution was a proper exercise of the powers so conferred upon the Board. It did not create a new class of member as plaintiff contends.

It merely set forth a reasonable procedure to be followed in all cases where surplus Grade "A" milk was delivered to the association; the result being that all Grade "A" producers who chose to deliver their surplus production would be paid at Grade "B" prices. Thus, a member who chose to follow such procedure was treated equally with all other members who likewise chose to follow such procedure to deliver surplus Grade "A" milk to the association. Therefore it cannot be said that the resolution did not operate equally upon all persons in that particular class: to-wit, producers of surplus Grade "A" milk. *Lindsay-Strathmore Irrigation Dist. v. Wutchumna Water Co.*, 111 Cal.App. 688, 296 P. 933.

From the record before us it is apparent that plaintiff failed to prove facts necessary to entitle him to a judgment, and therefore the trial court properly granted defendant's motion for a nonsuit. *Raber v. Tumin*, 36 Cal.2d 654, 226 P.2d 574.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



120 Cal.App.2d 364

BETTANCOURT et al. v. GILROY THEATRE CO., Inc.

Civ. 15506.

District Court of Appeal, First District,
Division 1, California.

Sept. 25, 1953.

Action by vendors against purchaser for failure to perform alleged written agreement for sale of realty which required the purchaser to erect "first class theater" on such realty as soon as materials, equipment, and furnishings were available at reasonable prices. The Superior Court, County of Santa Clara, entered judgment of nonsuit, and vendors appealed. The District Court of Appeal, Fred B. Wood, J., held that quoted phrase was sufficiently definite and certain

to form basis for contractual obligation and that evidence was sufficient to establish that such materials, equipment, and furnishings could be obtained at reasonable prices.

Judgment reversed.

1. Contracts ☞9(1), 147(1)

The law leans against destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of parties if it can be ascertained.

2. Contracts ☞9(1)

Where description of subject matter of an agreement is indefinite, contract is enforceable if subject matter is capable of being identified and rendered definite and certain by evidence aliunde.

3. Vendor and Purchaser ☞21

Where agreement for sale of realty required purchaser to erect "first class theater" on such realty as soon as materials, equipment, and furnishings were available at reasonable prices, quoted phrase was sufficiently definite and certain to form basis for contractual obligation, especially in subsequent action for damages rather than action for specific performance. Civ.Code, §§ 1643, 1647, 3541; Code Civ.Proc. §§ 1859, 1860.

4. Specific Performance ☞28(1)

A greater amount or degree of certainty is required in terms of an agreement which is to be specifically executed in equity than is necessary in contract which is basis of action at law for damages.

5. Frauds, Statute of ☞113(3)

Written agreement for sale of realty, which required purchaser to erect first-class theater on such realty as soon as materials, equipment, and furnishings were available at reasonable prices and which was subscribed by defendant purchaser, was sufficient to satisfy requirements of statute of frauds. Civ.Code, § 1624.

6. Vendor and Purchaser ☞329

In action by vendors against purchaser for failure to perform alleged written agreement for sale of realty which required purchaser to erect "first-class theater" on such realty as soon as materials, equip-

ment, and furnishings were available at reasonable prices, evidence was sufficient to establish that such materials, equipment, and furnishings could be obtained at reasonable prices.

7. Evidence ☞113(1)

Market prices are fair indication of reasonable prices in absence of any evidence to the contrary.

Rowland R. King, San Francisco, for appellant.

B. E. Kragen, Lionel B. Benas, San Francisco, Edward M. Fellows, San Jose (Edward Stern, San Francisco, of counsel), for respondent.

FRED B. WOOD, Justice.

Plaintiffs Alfred R. Bettancourt and Clara H. Bettancourt have appealed from a judgment of nonsuit in their action against Gilroy Theatre Co., Inc., for damages for failure of the defendant to perform an alleged contract "to erect a *First class Theatre*" on certain described real property in the City of Gilroy, California.

The contract in question, dated February 12, 1947, was written upon a printed form designated "Receipt and Agreement for Sale of Real Property." Plaintiffs therein agreed to sell and defendant to buy a certain parcel of land, situate on the west-erly side of Monterey Street, between Third and Fourth Streets, in the City of Gilroy, with a frontage of 80.2 feet and a depth of approximately 140 feet.

The stated monetary consideration was \$16,842, taxes to be pro-rated as of the date of delivery of the deed. In addition, the agreement declared: "The buyers are to erect a *First class Theatre* on the above described premises as soon as materials, equipments and furnishing are available; at reasonable prices. None of the restrictions, easements, covenants, conditions and rights of way to which said property is subject shall be such as will prevent the use of the property for motion-picture theatre purposes."

About March 5, 1947, plaintiffs conveyed the land to defendant and defendant paid the 16,842 dollars.

August 2, 1950, without erecting the theater or any building, defendant conveyed this land to third parties, receiving \$24,000 therefor.

The alleged damages consist of the enhancement in value which would have accrued to other properties of the plaintiffs (in the same block, on the same side of the street, with a frontage of about 214 feet) had the theater been built on the property sold to defendant.

The questions presented upon this appeal are these: (1) In respect to the erection of a first class motion picture theater, is the agreement sufficiently definite and certain to create and impose a contractual obligation upon the defendant; (2) does section 1624 of the Civil Code apply and render invalid the purported obligation to erect a theater; (3) did the obligation to erect a theater ever mature; i. e., did materials, equipment and furnishings become available at reasonable prices?

(1) *In respect to the erection of a first class motion picture theater, is the agreement sufficiently definite and certain to create and impose a contractual obligation upon the defendant?*

This question is pointed up by certain observations of the trial judge (made when granting defendant's motion for nonsuit and denying its motion for dismissal of the action), especially these: " * * * the courts can not bring themselves to say * * * that the courts are warranted or even are permitted to write a new contract and to define what in this case would be a first-class theater," that even if the court were to consider the testimony as to what a first class theater would be (evidence introduced over the objection that its admission would violate the parol evidence rule) "I do not believe the Court would * * * be warranted in trying to rewrite the contract for the parties * * * based upon the ambiguity that is in the contract, namely, the ambiguity which arises where * * * the defendant says he will construct a first-class theater", citing *Ellis v. Klaff*, 96 Cal.App.2d 471, 216 P.2d 15, and *Hart v. Georgia R. Co.*, 1897, 101 Ga. 188, 28 S.E. 637, and "the ruling of a non-suit, then, will present all possible questions of law."

Plaintiffs' position is that material terms were not omitted from the agreement, that plaintiffs' evidence was directed to showing that the language of the agreement was not indefinite (language which was understood by all concerned), and that there is involved no variance from or addition to the material terms of a written agreement.

[1,2] In considering this question we must bear in mind that "The law leans against the destruction of contracts because of uncertainty and favors an interpretation which will carry into effect the reasonable intention of the parties if it can be ascertained. *McIllmoil v. Frawley Motor Co.*, 190 Cal. 546, 549, 213 P. 971; *Sutliff v. Seidenberg, Stiefel & Co.*, 132 Cal. 63, 65, 64 P. 131, 469; *Roy v. Salisbury*, 21 Cal. 2d 176, 184, 130 P.2d 706; *Meyers v. Nolan*, 18 Cal.App.2d 319, 322, 63 P.2d 1216. The description of the subject matter of an agreement may be indefinite but if it is capable of being identified and rendered definite and certain by evidence *aliunde*, the contract is enforceable. *McIllmoil v. Frawley Motor Co.*, supra; *Mebius & Drescher Co. v. Mills*, 150 Cal. 229, 236, 88 P. 917; *Pease v. Lindsey*, 129 Cal.App. 408, 410, 18 P.2d 717. That is certain which can be made certain. Civ.Code, § 3538." *Avalon Products v. Lentini*, 98 Cal.App.2d 177, 179, 219 P.2d 485, 486; hearing by Supreme Court denied. See also Civ.Code, §§ 1643, 1647 and 3541; Code of Civ.Proc. §§ 1859 and 1860; *Corbin on Contracts*, § 95, p. 288 at 290-295.

The questioned testimony was that of several witnesses, including that of plaintiff Alfred Bettancourt. He said that "first-class theatre" as used in the agreement meant to him something better than the Strand Theater in Gilroy; it would mean a new building; to comply with the fire ordinance, it would have to be of concrete or cement blocks, something that would pass the fire law; it would be a nice building; presumably some stores would go along with it; it would be modern, but he did not have any particular design in mind; a building that would cover the lot. He never saw any plans for the building. When a real-estate agent first asked Bettancourt if he would sell this property he

was not much interested, he had in mind to develop the property himself; but when told the buyer wanted it for a theater site he became interested; a nice theater building there would enhance the value of the rest of his properties; he could see that a theater building going up there would "make" that end of town, would improve all those properties between Third and Fourth Streets.

James B. Lima, defendant's vice-president (called by plaintiffs under section 2055 of the Code of Civil Procedure), testified that in the latter part of 1946 he was looking for a theater site on Monterey Street in Gilroy; the defendant was operating and still operates the Strand Theater in that city; his search culminated in the agreement here involved, and acquisition of the land described in the agreement. He said that when he executed the agreement a "first-class theatre" meant to him "to erect a comfortable theater in Gilroy, according to the code required to build a theater in Gilroy. They have the city ordinance to build a theater with certain classifications and to make them comfortable as possible." He had plans prepared within a few months after purchase of this property, for a theater along the entire frontage of the lot, with two stores in front, one on either side of the entrance to the theater; there was nothing unusual about it, "just a nice building, as reasonable as we could get by according to the code"; steel construction, reinforced concrete; the plans called for about 900 seats; the Strand Theater has 800 seats.

Ralph Wyckoff, architect, examined these plans. He considered them preliminary drawings such as an architect would make for an owner who would like some idea of whether the property is suitable for the structure and to get a general idea of the size and the number of seats he probably could get in a building on that space. He viewed those drawings "as probably complying with the contract to the extent that they would be a first-class theater for Gilroy."

Three witnesses, in addition to Wyckoff and Bettancourt, testified concerning the

increase in value which would have accrued to the remaining Bettancourt properties if a first class theater had been built upon the property sold to defendant. None of these three was asked to describe what a first class motion picture theater in Gilroy meant to him, but none of them seemed to entertain any doubt or encounter any difficulty in using and applying that term in estimating the amount of damages.

From this evidence it appears that the expression "first-class theatre" for the exhibition of motion pictures was sufficiently definite and certain to enable the defendant to know what it had undertaken to do and, if defendant had built a theater, for a court to determine whether or not it represented a fair and reasonable performance of the contract.

Similar questions of definiteness and certainty have arisen, principally it would seem, in suits for specific performance of agreements to erect structures upon land owned by the defendant or under his control, structures deemed of benefit to neighboring lands of the plaintiff. Under such circumstances the plaintiff, having no access to the land, is not in a position to build the structure and recoup the cost thereof from the defendant.

Lawrence v. Saratoga Lake R. Co., 1885, 36 Hun, N.Y., 467, was such a case. A landowner agreed in writing to convey a railroad right of way across his land upon condition that the grantee erect at or near a certain spring " * * * a neat and tasteful station building for the accommodation of passengers to and from said spring, which shall be a regular station of the road, and all regular trains shall stop at said station * * *." 36 Hun at page 469. The railroad was afterwards built along the indicated line, with some deviations consented to by the grantor who added as a condition that certain bridges be constructed and maintained over the railroad. The railroad company failed to erect the station house and refused to build two of the bridges.

The trial court found the agreement so indefinite and uncertain that the court could not direct specific performance. The re-

viewing court, reversing the judgment,¹ said, concerning the element of certainty and definiteness: "One of the three things was to construct and maintain a bridge over the railroad at the old highway at Lawrence's east line. We see nothing indefinite in this. There can be no difficulty in determining where the highway is. To insist that the railroad cannot build a bridge because they do not know whether it should be of wood, or iron, or gold, or platinum, is a poor excuse. A bridge suitable for a highway crossing is what is intended, and that is definite enough. *Jones v. Seligman*, 81 N.Y. 190. If defendant were willing to perform its agreement, it would have no difficulty in understanding its obligations." 36 Hun at page 472. Concerning another bridge, the court said: "But the defendant's objection is that the size and material are not specified. We do not see why proof might not be given as to the size and material suitable and proper for bridges at those places, and for the purposes indicated. It is often the case that proof of surrounding circumstances is needed to explain a contract." 36 Hun at pages 472-473. Concerning the station, the court observed: "The third thing to be done by defendant was to erect at or near Excelsior Spring a neat and tasteful station building for the accommodation of passengers to and from said spring, which should be a regular station, and to have all regular trains stop at said station; the name to be Excelsior Spring Station. The same argument in regard to this building is urged by defendant, viz.: that the words 'a neat and tasteful station building for the accommodation of passengers to and from said spring,' are too indefinite. But it is found as a fact that the defendant has built station buildings for similar purposes; one about 4,000 feet east and the other about the same distance west

of the spring. Would there be any difficulty on defendant's part in building one at the plaintiff's spring? And would it not be easy for a court or a jury to decide whether a building was a fair and reasonable performance of this agreement, or was a fraud and an evasion?" 36 Hun at page 473.

In *Lane v. Pacific & I. N. R. Co.*, 1902, 8 Idaho, 230, 67 P. 656, 658, an agreement by a railway company to construct certain underground crossings, wooden culverts, fences and a switch or side track was found sufficiently definite and certain for the remedy of specific performance to be available. In *Molyneux v. Richard*, (1906), L.R. 1 Ch. 34, 41-42, specific performance was deemed proper, of an agreement by a lessee to build 7 dwelling houses similar to dwelling houses already erected on a certain street nearby, even though the latter were not all exactly alike. See also the cases collected in the notes in 15 L.R.A., N.S., 594; 16 L.R.A., N.S., 307; L.R.A. 1916F, 691; 14 Ann.Cas. 478; and 164 A. L.R. 802-840, especially 808, 810-815, and 834-837. In *Herzog v. Atchison, Topeka S. F. R. Co.*, 153 Cal. 496, 95 P. 898, 17 L. R.A., N.S., 428, the court denied specific performance of an agreement of a railway company to establish and maintain a permanent station for passengers and freight. The complaint failed to show that the agreement as originally made was fair and just as between the parties or that its enforcement would add to the convenience of the plaintiffs or to the value of any property owned by them or that damages would not afford an adequate remedy. The court did say that similar contracts had been specifically enforced (citing, among other cases, *Lawrence v. Saratoga Lake R. Co.*, supra, 1885, 36 Hun, N.Y., 467, and that: "Where such contracts are limited to the creation of a right to a certain station or

1. The reviewing court, while holding this a proper case for specific performance, deemed it improper to modify the judgment to accord that remedy, in view of the state of the record. Further evidence might be needed. "This case comes to us only on the findings of the court, and the plaintiffs ask that we modify the judgment by giving the relief to which they

are entitled. We do not think that this can properly be done. Evidence may be needed at the trial to explain the circumstances surrounding the agreement; the time needed for the construction of the bridges and station; the exact place as shown on the map, etc." 36 Hun, N.Y., at page 477.

train service at given points, without in any way making the right exclusive or infringing upon the company's obligation to furnish proper service at any other place where it may be needed we are not prepared to hold that their enforcement would necessarily be violative of public policy." at page 500 of 153 Cal., at page 899 of 95 P., 17 L.R.A., N.S., 428.

In *Fraley v. Bentley*, 1874, 1 Dak. 25, 46 N.W. 506, defendant when purchasing a portion of plaintiff's land agreed to erect a "steam saw-mill" on that portion but failed to do so. Plaintiff sued for specific performance or damages and was awarded damages. Concerning the element of certainty the reviewing court said: "It is with much zeal argued that there was no description or kind of mill agreed upon, and no time that the mill should remain on the land. We need only apply a good common-sense rule to settle this question. A good steam saw-mill, as ordinarily understood, would be a mill capable of doing such work, and to such amount, as is ordinarily done by good mills; the words 'good mill' have a reasonably definite meaning." 46 N.W. at page 508. In *St. Louis, I. M. & S. R. Co. v. Berry*, 1908, 86 Ark. 309, 110 S.W. 1049, 1050, damages were awarded against a railway company for failure to perform its agreement to erect a "siding and depot." Failure to designate the exact location and the kind of a depot to be built did not render the contract too indefinite to be carried out. "The stipulation of the deed under consideration contains no restrictions, and, being general in its character, could never become a source of embarrassment to the railroad company in the future. Appellee had a right to assume that it would erect a depot in keeping with other depots on its line of road and commensurate with the necessities of the public, and that it would be located at the point deemed most advantageous to the railroad, having reference to the topography of the ground as well as the convenience of the public. These were matters properly left to the judgment of the railroad company." pages 1050-1051 of 110 S.W. In *Atlanta & W. P. R. Co. v. Camp*, 1908, 130 Ga. 1, 60 S.Ct. 177, 15 L.R.A.,

N.S., 594, 14 Ann.Cas. 439, the court affirmed a judgment for the plaintiff in an action for damages for failure of the railway company to perform its agreement to establish a station at a point near plaintiff's property. In *Alderton v. Williams*, 1905, 139 Mich. 296, 102 N.W. 753, 754-755, an agreement by the defendant to convert his heading mill into a stavemill, to carry on the business of manufacturing the selling staves, was deemed sufficiently definite and certain to constitute a valid contract.

[3,4] Thus, it appears, there is ample authority for our holding that, under the circumstances of this case, the expression "First class Theatre" for the display of motion pictures was sufficiently definite and certain to form the basis for a contractual obligation, especially in an action for damages as distinguished from a suit for specific performance. "It is settled that "a greater amount or degree of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages. * * *'" *Pascoe v. Morrison*, 219 Cal. 54, 58, 25 P. 2d 9-11. Ours is an action for damages. Defendant lost the capacity to perform when it sold the theater site in 1950.

Defendant relies upon a number of cases which we have examined and do not consider applicable here. We mention some of them. *Ellis v. Klaff*, 96 Cal.App.2d 471, 216 P.2d 15, was an action for rent and damages for breach of a lessee's covenant to improve the premises " * * * by the construction of a building or buildings as soon as building conditions reasonably shall permit * * * any building or structure constructed by the lessee shall comply strictly with the Building Code of the city of Buenaventure.'" 96 Cal.App.2d at page 473, 216 P.2d at page 17. This clause was deemed too indefinite to create a contractual obligation and, we think, appropriately so. Neither the kind nor the number of buildings, nor the use or uses to which they respectively were to be put were specified in the writing. More like the agreement involved in our case was the joint venture agreement in *Hillman v. Hillman Land Co.*, 81 Cal.App.2d 174, 185, 183 P.

2d 730, 737, in which it was alleged that the parties agreed they would "construct about 30 three-bedroom houses" on a certain tract of land. In response to the contention that the failure to state the exact number of houses rendered the agreement too indefinite, the court said: "It is obvious that the number to be erected would depend upon the building and zoning laws and regulations and upon the portion of the property that would be required to be dedicated for street purposes. When these conditions became definitely known more or fewer than 30 dwellings might have been permissible. Such objections are hyper-technical and are without merit." *Cannaday v. Martin*, Tex.Civ.App., 1936, 98 S.W. 2d 1009, involved an agreement, partly written and partly oral, for the construction of a building. The written part, which merely described it as a "brick building," was deemed too vague and indefinite. The oral part apparently would have supplied sufficient detail but the statute of limitations had run. *Cincinnati Underwriters Agency Co. v. Thomas J. Emery Memorial*, 6 Cir., 88 F.2d 506, involved the covenant of a lessee to erect a building of fireproof construction, the portion thereof erected on the demised premises to cost not less than \$100,000. In holding the description too indefinite, the court said: "* * * there is no description of the building to be constructed; nothing is said as to whether the construction was to consist of a building placed entirely upon the property of the appellee or only partly on its property, nothing about its height, frontage, or the materials to be used." 88 F.2d at page 508. (Nor, we may add, was there any frame of reference such as, in our case, the Gilroy building ordinance and the Strand Theater, operated by the defendant.) An attempt was unsuccessfully made to show by parol that the parties intended a monumental building at least 10 stories high covering in part the demised premises and in part adjacent property. The written covenant bore no similarity to the agreement in our case. *Dusold v. Johnston*, 101 Cal.App.2d Supp. 907, 225 P.2d 536, involved a memorandum of a lease for a term of more than one year which was "totally lacking in identification of the term, its beginning and ending, or of

the rental and the time and places of its payment." 101 Cal.App.2d Supp. at page 909, 225 P.2d at page 537. In *Hart v. Georgia R. Co.*, 1897, 101 Ga. 188, 28 S.E. 637, the court deemed too indefinite an agreement on the part of the plaintiff to erect "a permanent and first-class hotel for the accommodation of the traveling public, and maintain the same in a first-class manner," and on the part of the defendant railway company "by the patronage of its road" to "maintain and support the same." Plaintiff alleged she did erect and maintain such a hotel, but that defendant had discontinued stopping its trains for meals. She sought damages. Said the court in part: "What is a first-class hotel? How is a hotel maintained in a first-class manner? What is the patronage of a road running trains day and night at a given point?" 28 S.E. at page 637. No authorities were cited. It does not appear that any of the railway depot cases, such as *Lawrence v. Saratoga Lake Ry. Co.*, 1885, supra, 36 Hun, N.Y. 467, or the Georgia case of *Georgia Southern R. Co. v. Reeves*, 1880, 64 Ga. 492, were brought to the attention of the court. In 1908 the Georgia Supreme Court deemed valid a contract of a railway company to establish and maintain a station at or near a certain settler's land, subject, of course, to the duty of the railroad to serve the public and, if continued maintenance of the station should interfere with the performance of that duty, further maintenance of the station could and should be discontinued. The court did not indicate that it entertained any doubt on the ground of definiteness or certainty, nor did it cite the *Hart* case. *Atlanta & W. P. R. Co. v. Camp*, 130 Ga. 1, 60 S.E. 177, 15 L.R.A., N.S., 594, 14 Ann. Cas. 439.

(2) *Does section 1624 of the Civil Code apply and render invalid the purported obligation to erect a theater?*

[5] Section 1624 of the Civil Code applies to the agreement here involved. This statute declares invalid "an agreement * * * for the sale of real property," unless "the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent".

The agreement here involved is in writing and is subscribed by the defendant.

This writing satisfied the requirements of section 1624. It contains, as we have seen, the essential terms of the contract. The evidence considered above in relation to the parol evidence rule does not supply or vary any of those terms. It merely serves to identify the subject matter from the written description and assists in interpreting the expressed intentions of the parties in the light of circumstances at the time of execution of the contract. See *United Truckmen, Inc. v. Lorentz*, 114 Cal. App.2d 26, 34, 249 P.2d 352, and authorities there cited.

(3) *Did the obligation to erect a theater ever mature? Did materials, equipment and furnishings become available at reasonable prices?*

Defendant agreed to erect the theater "as soon as materials, equipment and furnishings are available; at reasonable prices." Defendant claims the evidence is not sufficient to support a finding that materials, equipment and furnishings for the erection of a first class motion picture theater became available at reasonable prices.

An expert witness, Ralph Wyckoff, an architect of thirty years' experience, familiar with building prices and costs, testified that building materials and equipment started to become available in 1947 (the agreement in suit was executed in February, 1947); that in the middle of that year he was building almost any type and getting anything he wanted; thereafter they were coming along in good shape; several large furniture factories were making theater seats by the thousands in 1947. He did not have personal knowledge concerning the availability of motion picture equipment at that time. However, the fact that a drive-in motion picture theater was built near Gilroy in 1949 (purchased by defendant in April, 1950) would support an inference that motion picture equipment was available.

[6] Concerning "reasonable prices," Wyckoff testified there was no rise in theater building costs during 1947; they had leveled off about then; 1947 and 1948 were

about the same; there was a little drop in 1949 and 1950, until we became engaged in war in Korea. This testimony would furnish sufficient support for a finding that motion picture theater materials, equipment and furnishings could be obtained at reasonable prices.

[7] Defendant challenges such a conclusion upon the ground that Wyckoff spoke merely of market prices, claiming that market prices furnish no evidence of reasonable prices. That argument ignores the fundamental notion that when goods are available in the market place, the prices which there obtain are normally a convenient and acceptable indication of their reasonableness.

The availability of goods at reasonable prices presented a question of fact. The testimony that they had become available bore upon one aspect of the question. The testimony that prices had declined and were on the decline bore upon the other. It was inferable that there was a market and, in the absence of evidence to the contrary, that the prices which obtained in the market were reasonable. In applying the expression "reasonable prices" in a contract for the purchase of malt liquors, the court in *Courage & Co. Limited v. Carpenter*, 1 Chan.Div. (1910) 262, 268, said: "It seems to me that I cannot hold that the prices adopted practically by the whole of the London brewers, and assented to by practically the whole of the licensed victuallers trading in London, are unreasonable prices." In respect to the sale of a certain kind of paper, for which there was a uniform market price among paper houses, the court in *Coleman v. Modern Miller Pub. Co.*, Mo.App., 1919, 213 S.W. 172, held that a price slightly in excess of the market price was reasonable where the seller extended unlimited credit to the buyer (as distinguished from cash or cash within thirty days) and the buyer did not pay its bills regularly. We conclude that market prices are a fair indication of reasonable prices in the absence of any evidence to the contrary.

The judgment appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

120 Cal.App.2d Supp. 907

PEOPLE v. SEVEL.

No. 181160.

Appellate Department, Superior Court,
San Diego County, California.

Sept. 3, 1953.

Prosecution for conducting a yard for storage of nonoperating motor vehicles not entirely inside an enclosed building or upon premises enclosed by solid fence at least six feet in height. The Municipal Court, South Bay Judicial District, dismissed the complaint and the people appealed. The Superior Court, Burch, J., held that county was within its police powers in passing ordinance and the ordinance as applied to defendant's rights was constitutional.

Reversed.

1. Counties ⇨55

County ordinance providing that the ordinance would have been passed irrespective of unconstitutionality of any section, evidenced the purpose of the governing board to make the ordinance severable.

2. Counties ⇨21½

A defendant has no grievance, as to the constitutionality of county ordinance under which he is tried, beyond what is charged against him in the complaint.

3. Municipal Corporations ⇨611

The business of the storage of nonoperating motor vehicles is of a type that is subject to police regulation.

4. Municipal Corporations ⇨63(1)

The proper construction material for a fence that is to enclose a junk yard is a question of fact for legislative, rather than for the judicial determination.

5. Constitutional Law ⇨296(1)

County ordinance providing that it shall be unlawful to maintain a junk yard in the county unless it is maintained within an enclosed building or upon premises enclosed by a solid fence at least six feet high, does not violate constitutional right of the owner to conduct a lawful business, but is a reasonable restraint in the interest of public safety and general welfare. U.S.C.A. Const. Amend. 14.

James Don Keller, Dist. Atty., and County Counsel, San Diego, by Robert G. Berrey, Deputy, San Diego, for appellant.

Stickney & Stickney and Edward Strop, San Diego, by Ben W. Hamrick, San Diego, for respondent.

BURCH, Judge.

An amended complaint, criminal, was filed in the Municipal Court, South Bay Judicial District, against the defendant, Harry Sevel. Therein, the defendant was charged that " * * * on or about the 14th day of August, 1952, in South Bay Judicial District, in the said County of San Diego, State of California, and before the making or filing of this Complaint, did then and there wilfully and unlawfully within the unincorporated territory of the County of San Diego carry on, maintain, and conduct a yard for the storage of nonoperating motor vehicles without carrying on, maintaining or conducting such yard for the storage of nonoperating motor vehicles entirely inside an enclosed building or buildings, or on premises entirely enclosed by a solid fence or wall at least six (6) feet in height as provided in said Ordinance No. 953 (New Series), as amended by County of San Diego Ordinances Nos. 1044 (New Series) and 1108 (New Series)."

The defendant noticed a motion for an order dismissing the complaint. It was stipulated that the court could take judicial notice of the ordinance as amended which regulated junk yards and auto wrecking establishments, and exhibits thereof were attached to the stipulation. The motion was submitted upon briefs and the court ordered that the complaint be dismissed. The defendant has filed no brief on appeal.

There is before us no statement of the reason for the dismissal. On dismissing the complaint, the trial court ordered that the above entitled case be transferred to this court on appeal. The motion to dismiss was based upon the contention of the defendant that the ordinance was in derogation of his rights under the due process clause of the Fourteenth Amendment of the Constitution of the United States. In

defense of the propriety of the ordinance, the People argue here for its validity as a law.

Ordinance No. 953 as amended was adopted by the Board of Supervisors on March 20, 1950. It is entitled, "An Ordinance Regulating Junk Yards And Auto Wrecking Establishments." Section 1 provides:

"It shall be unlawful for any person,
* * * to carry on, maintain or conduct a junk yard, motor vehicle wrecking yard or yard for the storage of nonoperating motor vehicles in the unincorporated territory of the County of San Diego, unless such establishment is carried on, maintained or conducted in compliance with the following regulations: * * *

"(a) Such establishment shall be carried on, maintained or conducted entirely inside an enclosed building or buildings, or on premises entirely enclosed by a solid fence or wall at least six (6) feet in height and constructed according to the requirements of the Building Code of said County, and other applicable ordinances.

"(b) Such fence or wall shall be maintained in a neat, substantial, safe condition and shall be painted, unless of masonry or rust proof metals."

Subsection (e) provides: "No junk or second-hand article shall be piled, or permitted to be piled, in excess of the height of the enclosing fence or wall or nearer than two (2) feet thereto."

Subsection (f) provides: "All gasoline, oil or other inflammable liquid and all gas shall be drained and removed from any unregistered motor vehicle or other junk or second-hand article located in said building, buildings or premises."

Subsection (g) provides: "The material located in or on the premises shall be so arranged that reasonable inspection or access to all parts of the premises can be had at any time by the proper fire, health, police and building authorities."

Section 2 provides: "Every person,
* * * licensed hereunder shall keep

a record in written English of each purchase made by the licensee where the purchase is initiated and completed and delivery is made by the vendor or his agent within the County of San Diego. This record shall be made on forms furnished by the Sheriff of San Diego County and shall show the following:

"(a) The name of the person from whom the goods were purchased, together with the address, and description of the person from whom such goods were purchased, and the license number and description of the vehicle in which the goods are delivered to the purchaser."

Subsection (b) further requires that the goods purchased shall be described by the name of the article, name of the manufacturer, if known, and serial number or numbers if the article is one which is identified by such numbers.

It is further required by subsection (c) that these records be made available for inspection by the sheriff, or any public officer of the State, at all reasonable times for a period of two years.

Subsection (d) requires that the licensee shall forward on the first day of each week copies of such lists of property purchased to the office of the sheriff.

Section 3 makes the ordinance applicable to existing establishments and provides a period of time for compliance.

[1, 2] Section 6 makes any violation of the ordinance a misdemeanor punishable as such, and Section 7 provides for severability of provisions, to wit:

"If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be unconstitutional, the Board of Supervisors hereby declares that it would have passed this ordinance irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases thereof be declared unconstitutional."

The Board of Supervisors have clearly evidenced their purpose to make severable the respective regulations, and have effectively achieved that purpose in Section

7 (quoted above). Moreover, the defendant has no grievance beyond what is charged against him in the complaint. *People v. Perry*, 212 Cal. 186, 193, 298 P. 19, 76 A.L.R. 1331; *People v. Steelik*, 187 Cal. 361, 365, 203 P. 78; *In re West*, 75 Cal.App. 591, 605, 243 P. 55; *People v. Naumcheff*, 114 Cal.App.2d 278, 280, 250 P.2d 8.

We, therefore, direct our attention to the constitutionality of Section 1(a) which relates to the requirement that the business premises be enclosed by building, fence or wall.

[3] The courts have said that this type of business is subject to police regulation to prevent unscrupulous persons from disposing of stolen property through such medium. *Gospel Army v. City of Los Angeles*, 27 Cal.2d 232, 256, 163 P.2d 704; *Lewis v. Quinn*, 217 Cal. 410, 413, 19 P.2d 236; *In re Holmes*, 187 Cal. 640, 645, 646, 203 P. 398; *Co-operative Junk Co. v. Board of Police Commissioners*, 38 Cal.App. 676, 679, 177 P. 308; *Zemansky v. Board of Police Commissioners*, 61 Cal.App.2d 450, 453, 143 P.2d 361.

[4] From the face of other portions of the ordinance noted above, it is also at once apparent that fire risks are involved from gaseous fumes of unused gasoline in tanks and greasy upholstery of second-hand automobiles which reasonably suggest police regulation by adequate housing or fence or wall enclosure. Refined arguments of whether one or another type of fence would best accomplish the public safety in this regard involve fact questions for legislative, rather than judicial, determination.

The police power, generally, has been referred to as " * * * one of the most essential powers of government,—one that is the least limitable." *Hadacheck v. Sebastian*, 239 U.S. 394, 410, 36 S.Ct. 143, 145, 60 L.Ed. 348.

Chief Justice Stone stated the principle:

261 P.2d—23½

"When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision." *South Carolina State Highway Department v. Barnwell Bros., Inc.*, 303 U.S. 177, 190, 191, 58 S.Ct. 510, 517, 82 L.Ed. 734.

Chief Justice Hughes' expression of the rule in *Borden's Farm Products Co., Inc., v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281, was quoted with approval by Justice Brandeis in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185, 56 S.Ct. 159, 163, 80 L.Ed. 138, as follows:

"The order here in question deals with a subject clearly within the scope of the police power. * * * When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge, or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' *Borden's Farm Products Co. v. Baldwin*, 293 U.S. 194, 209, 55 S.Ct. 187, 192, 79 L.Ed. 281."

[5] We find nothing in Section 1(a) which violates the defendant's constitutional right to conduct his lawful business. Such regulation as is imposed by the section is but a reasonable restraint in the interest of the public safety and general welfare.

The order dismissing the complaint is reversed.

TURRENTINE, P. J., and GLEN, J.,
concur.

120 Cal.App.2d Supp. 921

PEOPLE v. BANKS.**Cr. A. 14.**

Appellate Department, Superior Court,
San Bernardino County, California.

Sept. 30, 1953.

Defendant was convicted in the Justice Court of Barstow Judicial District, W. E. Winfield, J., of petty theft, and he appealed. The Appellate Department of the Superior Court, Mitchell, J., held that evidence, including that on issue of intent to steal, was sufficient to sustain conviction.

Judgment affirmed.

1. Larceny ☞41

In prosecution for petty theft, the intent to steal is an element which must be proved by the State.

2. Criminal Law ☞338(2)

The intent with which an act is done is manifested by the circumstances attending the act.

3. Larceny ☞57

Evidence, including that on issue of intent to steal, was sufficient to sustain conviction of defendant for petty theft.

4. Criminal Law ☞568

Intent is a question of fact which may be proved, like any other fact, by acts, conduct, and circumstances connected with the offense. Pen.Code, § 21.

Daniel J. Cowett, San Bernardino, for appellant.

Lowell E. Lathrop, San Bernardino, Dist. Atty., for respondent.

MITCHELL, Judge.

Appellant was charged with petty theft, to which he pleaded not guilty. After a trial before a jury a verdict of guilty was returned. Judgment followed and the appellant was sentenced to serve 180 days in the county jail.

A notice of appeal was filed and proposed statements were submitted by appellant and respondent.

It was stipulated that the two proposed statements might be considered as a settled statement.

From the statement it appears that in June, 1952, appellant was employed at the Beacon Tavern in Barstow; that on the night of June 26, 1952, the appellant was discharged; appellant claimed to be entitled to more money than was paid to him but his employer told him to take his complaint to the Labor Commissioner.

Appellant's employer had certain food-stuffs, meat and fish, stored in a freezer at the Hardwick Market because the tavern freezer was out of repair. These facts were known to appellant.

On the morning of June 27, 1952, appellant removed the meat and fish from the freezer and placed them in his automobile.

On learning that the food had been removed by appellant the proprietor of the tavern notified the police.

Shortly after noon on June 27, 1952, Officer Jackson, of the Barstow Police Department, located appellant's automobile in the driveway in the sun at appellant's home and found the food in the automobile. Appellant was inside the house partially disrobed.

Appellant testified that he took the meat for the purpose of returning it to the Beacon Tavern.

The jury did not credit this story.

[1] Appellant argues, correctly, that "intent to steal" must be proven.

[2] The intent with which an act is done is manifested by the circumstances attending the act.

The jury found that the intent was established.

This appeal is taken upon the grounds of insufficiency of the evidence to sustain the verdict. The only issue presented is whether there is substantial evidence sufficient to support the conclusion reached in the lower court.

[3, 4] There is no evidence in this case, other than the explanation offered by appellant (which the jury had a right to disbe-

lieve), to warrant the inference that appellant did not intend to steal the property. On the contrary, there was ample evidence from which the jury could and did conclude that appellant's actions were motivated by an intent to commit the offense of which he was convicted. "Intent is a question of fact which may be proved, like any other fact,

by acts, conduct, and circumstances connected with the offense. Section 21, Pen.Code' ". People v. Wade, 71 Cal.App.2d 646, 652, 163 P.2d 59, 62.

Judgment affirmed.

HILLIARD and FINDLAY, JJ., concurred.

41 Cal.2d 558

**HENNINGSSEN v. MAYFAIR PACKING
CO. et al.
S. F. 18832.**

Supreme Court of California, in Bank.
Oct. 6, 1953.

Action against seller of carloads of dried fruit, for breach of seller's written guaranty against decline in invoice prices, brought by assignee of buyer's claim. The Superior Court, Santa Clara County, entered judgment for plaintiff, and defendant appealed. The Supreme Court, Edmonds, J., held that evidence was insufficient to sustain finding that, during period of guaranty, decline in value of the fruit was the amount of the damages awarded, nor was the evidence concerning decline in prices during guaranty period sufficient to permit Supreme Court to direct a modification of judgment.

Judgment reversed.

Prior opinion 253 P.2d 35.

1. Appeal and Error ⇐1154

Sales ⇐441(4)

In action against seller of carloads of dried fruit, for breach of seller's written guaranty against decline in invoice prices, brought by assignee of buyer's claim, evidence was insufficient to sustain finding that, during period of the guaranty, decline in value of the fruit was the amount of damages awarded, nor was the evidence concerning decline in prices during guaranty period sufficient to permit Supreme Court to direct a modification of judgment.

2. Assignments ⇐89, 119

Assignee of a chose in action for purpose of collection acquires legal ownership and right to sue upon it.

3. Licenses ⇐19(3)

Statutory exclusion of attorneys at law from category of collection agencies required to be licensed extended to attorney's secretary, to whom claim was assigned for collection, and secretary, as attorney's alter ego in the matter, could enforce claim without procuring license. Business and Professions Code, §§ 6852, 6854, 6870.

James F. Boccardo, San Jose, Jean M. Blum, San Jose, and Edward J. Niland, Santa Clara, for appellant.

261 P.2d—33½

O. Vincent Bruno and Frank S. Barrett, San Jose, for respondent.

EDMONDS, Justice.

Helen Henningsen, as assignee of J. B. Griffin, sued upon a written guaranty. The appeal from a judgment in her favor challenges her standing to bring this action and the sufficiency of the evidence to support the findings upon which the award of damages was based.

In September, 1946, Griffin, a wholesale broker and distributor of food, was doing business as the J. B. Griffin Company. By an oral agreement, he purchased several carloads of dried fruit from Mayfair Packing Company. The agreement included a guaranty in writing by the corporation against declining prices. The guaranty, signed by W. L. Battaglia as agent for Mayfair, referred to three specific carload lots and stated "we guarantee your floor stocks of Mayfair Dried Fruits against decline in our prices".

Between January 1, 1947, and November 11, 1948, the prices of Mayfair's dried fruit declined. Griffin sold most of his Mayfair fruit during that period, generally at prices below those for which he purchased it. He then employed an attorney to enforce the guaranty and assigned his claim to Helen Henningsen, the attorney's secretary.

The complaint was in three counts. In the first, a breach of the written guaranty was charged; the second pleaded an account stated. The third count was based upon an alleged breach of a contract to give Griffin an exclusive dealership. The corporation's answer denied these allegations and pleaded affirmatively the defenses of fraud, absence of consideration, the statute of limitations, and the assignee's asserted lack of standing to sue.

Upon the trial, a nonsuit was granted as to Battaglia. Judgment was rendered against Mayfair on the first cause of action and in its favor on the second and third counts. Mayfair's motion for a new trial was denied.

The findings of fact state that the guaranty, by custom and usage of the fruit

packing industry, was limited to a reasonable period of time after the receipt of the fruit by the buyer. That period terminated on April 14, 1947. Another finding was that Mayfair's prices on dried fruit declined during the period of guaranty, reducing the value of Griffin's stocks in the amount of \$7,593.11.

Concerning Miss Henningsen's standing to bring the action, the court found that the assignment of Griffin's claim to her was for a valuable consideration and that she was not engaged, directly or indirectly, in the collection business. It was concluded that she was legally entitled to maintain the action and recover judgment.

Mayfair contends that the amount of the damages awarded is without support in the evidence. More specifically, it argues, there is no evidence showing that amount of decline in its prices during the guaranty period.

Griffin's purchases, consisting of dried peaches, prunes, and mixed fruits from the 1946 crop, were delivered to him early in January, 1947. According to his testimony, the market prices were high until the end of January, 1947. In February they declined slightly, and in April made a sharp drop, continuing to decline until October, 1948. Griffin's sales of Mayfair fruit continued throughout that period.

The respondent's theory on the trial was that the guaranty against declining prices extended for the entire period that Griffin's Mayfair fruit remained unsold. All of the several estimates Griffin offered to establish the amount of loss were computed upon prices not shown to have been in effect during the period of guaranty.

The sum adopted by the trial court in fixing damages was one of these estimates. The amount was computed on the basis of Griffin's inventory as of April 14, 1947, but using prices stated in the lists issued by certain competitors of Mayfair in October of that year. Mayfair argues that this computation is erroneous for two reasons: (1) because the guaranty was only against declines in Mayfair's prices and they are not established by prevailing market prices or price lists of competitors; and (2) be-

cause prices in October are not an accurate index of prices during the preceding April.

The record shows that, customarily, the major packing companies issue periodic bulletins which indicate generally the prices of their products. Although the packers are not bound to adhere to them, such lists reflect roughly their selling prices. The lists are revised continually, and although some packers do not sell at the prices charged by their competitors, the general practice is to do so. Accordingly, the price list of any packer is a rough approximation of the prevailing market price.

[1] With the exception of two of Mayfair's bulletins, the record includes no price lists in effect during the guaranty period. However, those bulletins were issued in February, 1947, prior to the initial decline, and show amounts above those paid by Griffin for his purchases. There was no testimony as to the prevailing market prices during the guaranty period, other than the general statement that they declined slightly in February and dropped sharply in April. The evidence presented in support of Griffin's claim was that the prices continued to decline, with great fluctuation, after that time, and it negatives any inference that the October prices in any way reflected those prevailing six months earlier. In short, there is no evidence sufficient to support the finding that, *during the period of the guaranty*, the decline in value of Griffin's Mayfair fruit was the amount of the damages awarded.

Mayfair also takes the position that the record discloses sufficient evidence concerning the decline in prices during the guaranty period to permit this court to direct a modification of the judgment. This evidence concerns the sales made by Mayfair and by Griffin between April 1 and April 14, 1947, based upon invoices of the two companies.

The compilation of Mayfair's sales during that period shows that no loss would have been sustained by Griffin had he then sold his Mayfair fruit. However, at that time, all of Mayfair's sales were of export items, and there is no evidence tending to prove domestic sales at the same prices.

Griffin's invoices during the same period indicate that he would have sustained a loss of \$885.48 had he sold all of his fruit at those prices. Mayfair argues that such sales must be supposed to have been at prevailing market prices, which in turn governed Mayfair's prices, and by such reasoning the decline in Mayfair prices during the guaranty period may be calculated. But there is no evidence tending to prove that Griffin's sales were at the prevailing market prices.

[2] Concerning Miss Henningsen's standing to bring this action, Mayfair challenges the finding that Griffin's assignment of his claim to her was for value. The only evidence upon this point was the testimony of Griffin, who stated that the assignment was not for value but merely for the purpose of collection. However, such an assignee of a chose in action acquires legal ownership and the right to sue upon it. *Hammell v. Superior Court*, 217 Cal. 5, 8, 17 P.2d 101.

Mayfair takes the position that the assignee is barred from enforcing the claim by those sections of the Business and Professions Code which require collection agencies to be licensed. §§ 6852, 6870. The corporation asserts that she is within the purview of section 6870 which states that "[n]o person shall * * * seek to make collection or obtain payment of any claim on behalf of another without having first applied for and obtained a license." In reply, it is argued that the provision was intended to apply only to those persons who made a practice or business of collecting claims for others and was not meant to prohibit isolated transactions of the kind shown by this record.

[3] It is unnecessary to decide whether the section applies to single transactions. By section 6854 of the same code, attorneys at law are excluded from the category of collection agencies. Although it was admitted that Miss Henningsen is not an attorney at law, it was stipulated that she was employed by Griffin's attorney. It may reasonably be inferred that she was the attorney's alter ego in enforcing the claim.

In *Dodson v. Greuner*, 28 Cal.App.2d 418, 82 P.2d 741, the enforcement of a claim

was resisted on the ground that an assistant to the assistant vice-president could not qualify as the credit officer of the bank, who is not a "collection agency". § 6854, Bus. & Prof.Code. The court found no evidence in the record showing that he was not such officer, but held that, in any event, the action would not be barred. It would be unreasonable, it was said, to suppose that the Legislature intended all of the credit work of a large institution to be done by one person without the power to delegate portions of it to other employees.

It is a common practice, dictated by procedural conveniences, for an attorney to accept an assignment of a chose in action in the name of an employee. That practice was followed in the present case. So long as the attorney is enforcing the claim on behalf of his client, the real party in interest, no sound reason appears why the assignment of it may not be taken in an employee's name.

The judgment is reversed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.



41 Cal.2d 536

PEOPLE v. MORTON.

Cr. 5503.

Supreme Court of California, In Bank.

Sept. 25, 1953.

Defendant was convicted on three counts of burglary in the first degree and one count of attempted burglary of the first degree, and was adjudged an habitual criminal. The Superior Court of Alameda County entered judgment, and defendant appealed. The Supreme Court, Traynor, J., held that evidence was insufficient to establish prior conviction.

Portion of judgment adjudging defendant an habitual criminal reversed, and cause remanded with directions.

Prior opinion 258 P.2d 100.

1. Criminal Law Ⓒ1202(3)

In order to establish that defendant is an habitual criminal, prosecution must prove prior convictions beyond a reasonable doubt. Pen.Code, § 644(a).

2. Criminal Law Ⓒ1202(3)

If prior convictions of defendant were suffered in foreign states for offenses that go by different names than those within the state, prosecution, in order to establish that he is an habitual criminal, must prove that minimum elements of foreign offense are substantially similar to minimum elements of one of the offenses enumerated in the Habitual Criminal Statute. Pen.Code, § 644(a).

3. Criminal Law Ⓒ1202(3)

Where prosecution sought to establish that defendant was an habitual criminal, fingerprint record card from penitentiary of foreign state showing defendant's imprisonment was properly admitted in evidence. Pen.Code, §§ 644(a), 969b.

4. Criminal Law Ⓒ1202(3)

Where evidence, introduced by prosecution in attempt to establish that defendant was an habitual criminal, merely showed by fingerprint record card from penitentiary in another state that defendant had been convicted of an offense indicated by initials "HBL," and such initials were in no way explained by authorities of foreign state, and the only testimony was that in bulletin of F.B.I. the initials "HB" stand for housebreaking and "L" for larceny, there was not sufficient proof that defendant suffered prior conviction in foreign state within meaning of Habitual Criminal Statute. Pen.Code, § 644(a).

5. Criminal Law Ⓒ1202(7)

Statute relating only to amendment of a pending indictment or information to add new prior conviction charges before verdict has no bearing on procedure to be followed on appeal when evidence is found insufficient to support finding that there was a prior conviction of a defendant found to be an habitual criminal. Pen.Code, § 969b.

6. Criminal Law Ⓒ1202(7)

Where defendant was convicted of burglary and was also adjudged an habitual

criminal, and on appeal the Supreme Court found that evidence was insufficient to support finding that there was a prior conviction of defendant, case would be remanded to trial court for new trial only on issue of prior conviction. Pen.Code, § 644(a).

7. Criminal Law Ⓒ1202(7)

Where defendant was convicted on three counts of burglary of the first degree and one count of attempted burglary of the first degree, and defendant was sentenced to serve consecutive terms, and he was also adjudged an habitual criminal, and Supreme Court on appeal determined that evidence was insufficient to establish that defendant was an habitual criminal, case would be remanded to trial court for resentencing of defendant, since trial court might have been influenced, in imposing consecutive rather than concurrent terms, by determination that defendant was an habitual criminal. Pen.Code, § 644(a).

George Nye, Public Defender, and Rudolf H. Michaels, Asst. Public Defender, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

TRAYNOR, Justice.

Defendant was convicted of three counts of burglary of the first degree and one count of attempted burglary of the first degree, for which he was sentenced to serve consecutive terms. He was also adjudged an habitual criminal under Penal Code, section 644(a). He appeals from that part of the judgment adjudging him an habitual criminal, and from the order denying his motion for a new trial on the issue of the alleged second prior conviction.

The appeal is presented by stipulation on a reporter's transcript limited substantially to the evidence relating to the alleged second prior conviction. The information alleged that defendant was convicted in February 1950, "of a felony, to wit, housebreaking and larceny," and had served a term in the Tennessee State Penitentiary pursuant to such conviction. To prove this

conviction the People introduced into evidence, over the objection of defendant, a fingerprint record card certified to be from the files of the Tennessee State Penitentiary. This card contained the fingerprints of a person who had served a term in that penitentiary for a crime designated by the abbreviation "HBL." Lawrence Waldt, a sergeant of the Sheriff's Office of Alameda County, and an expert in fingerprint identification, testified that the fingerprints on the card matched those of defendant taken the previous day. The sergeant was then asked if he was familiar with the "abbreviations used by criminologists and the police, the F.B.I., for various crimes * * *." He replied that he was familiar "to some extent." To the further question whether he was familiar with the abbreviation "HBL" he replied: "The Federal Bureau of Investigation puts out a Bulletin of Standardized Abbreviations, and 'HB' is, as near as my memory stands, correct for the abbreviation for housebreaking, and 'L' is the desired abbreviation for larceny." On cross-examination, Sergeant Waldt admitted that he did not know the elements of the offense or offenses designated by the initials "HBL," as those elements are defined in the laws of Tennessee. This evidence was all that was introduced by the People to sustain the allegation that defendant had suffered a second prior conviction "of a felony, to wit, housebreaking and larceny * * *."

[1,2] A sentence of life imprisonment, which follows an adjudication that the defendant is an habitual criminal, is a serious one. The People must prove the alleged prior convictions beyond a reasonable doubt. See *In re McVickers*, 29 Cal.2d 264, 278, 176 P.2d 40; *In re Lamey*, 85 Cal.App. 2d 284, 289, 193 P.2d 66; and cases there cited. If the convictions were suffered in other states for offenses that go by different names from those in California, the People must prove that the minimum elements of the foreign offense are substantially similar

to the minimum elements of one of the offenses enumerated in Penal Code, section 644(a). In *re McVickers*, supra, 29 Cal.2d 264, 267, 176 P.2d 40; In *re Wolfson*, 30 Cal.2d 20, 23, 180 P.2d 326.

Defendant admits the first prior conviction alleged in the information. With respect to the alleged second prior conviction, he admits that the fingerprints on the record card introduced by the People are his, and that he served a term in the Tennessee State Penitentiary. He contends, however, that the evidence introduced at the trial was insufficient to prove a second prior conviction of one of the felonies enumerated in Penal Code, section 644(a).

[3,4] The fingerprint record card from the Tennessee State Penitentiary showing defendant's imprisonment was properly admitted in evidence under Penal Code, section 969b.¹ The controlling question is whether that card and the testimony of the sergeant from the Sheriff's Office are sufficient to prove that defendant had suffered the alleged second prior conviction. We have concluded that they are not.

Although there is no deficiency in the type of document introduced by the People, there is a deficiency in the information it contains. It does not show the offense for which defendant was convicted. It merely shows an entry that defendant was convicted of an offense that an official of the Tennessee State Penitentiary indicated by the initials "HBL." These initials are in no way explained by Tennessee authorities. The People rely, instead, on the testimony of a sergeant of the Sheriff's Office who admitted that he did not know the elements of the offense or offenses designated by the initials "HBL," as those elements are defined in the laws of Tennessee. His testimony showed only that, "as near as my memory stands," in the Federal Bureau of Investigation's "Bulletin of Standardized Abbreviations" the initials "HB" stand for housebreaking, and the initial "L" for larceny. Such a system of abbreviation

1. Penal Code, section 969b provides that prima facie evidence of prior convictions and imprisonment can be established by " * * * the records or copies of records of any state penitentiary, * * * ,

in which such person has been imprisoned, when such records or copies thereof have been certified by the official custodian of such records * * *."

might be used by the Federal Bureau of Investigation, or by the police of California and other states, but proof of that fact is inapposite as proof of the meaning of these initials on the card in question unless it is also shown by competent evidence that this system of abbreviation is in use in the Tennessee State Penitentiary. It does not strain the imagination to identify several other possible charges with the initials "H," "B," and "L."² Furthermore, there is nothing to indicate that the initials stand for a single offense, "housebreaking with intent to commit larceny," as the People contend, rather than two or three separate offenses. If the information contained in the records of foreign penal institutions in which a defendant was imprisoned does not make clear the nature of his offense, it does not seem unreasonable to require the People to ascertain the particular statute that the defendant violated, or to obtain a certified copy of the judgment of conviction for the purpose of proving the elements of the offense in question.

Since the evidence is insufficient to support the finding of the trial court that defendant suffered the alleged second prior conviction, the question arises as to the order that should now be made by this court. The precedents are conflicting:

(1) In some cases the order reversed the entire judgment and remanded the cause for a new trial on all issues, including the charge of the primary offenses as well as that of the prior convictions. *People v. Nicholson*, 1939, 34 Cal.App.2d 327, 93 P.2d 223; *People v. Richardson*, 1946, 74 Cal. App.2d 528, 169 P.2d 44. Cf. *People v. Ysabel*, 1938, 28 Cal.App.2d 259, 263, 82 P.2d 476.

(2) In other cases the order was similar to (1) above, but specified a period of time within which the District Attorney could apply for an order dismissing the charge based on the challenged prior convictions.

If the application were made and granted, the trial court was directed to resentence the defendant on the basis of the primary offenses of which he was found guilty and any unchallenged prior convictions. If no application were made, or if it were made and denied by the trial court, the court was directed to grant a new trial on all issues. *People v. Carrow*, 1929, 207 Cal. 366, 278 P. 857; *People v. Chadwick*, 1906, 4 Cal.App. 63, 87 P. 384, 389.

(3) In certain cases the order set aside the finding that the defendant suffered the challenged prior conviction. In some of these cases the judgment was modified by vacating the adjudication that the defendant was an habitual criminal, and in others the cause was remanded for resentencing on the basis of the primary offenses of which the defendant was found guilty and any unchallenged prior convictions. *People v. Eppinger*, 1895, 109 Cal. 294, 41 P. 1037; *People v. Murray*, 1940, 42 Cal.App. 2d 209, 108 P.2d 748; *People v. McChesney*, 1940, 39 Cal.App.2d 36, 102 P.2d 455; *People v. Lohr*, 1938, 28 Cal.App.2d 397, 82 P.2d 615; *People v. Morrison*, 1938, 26 Cal.App.2d 616, 80 P.2d 94; *People v. Pace*, 1934, 2 Cal.App.2d 464, 38 P.2d 202; *People v. Shaw*, 1934, 137 Cal.App. 533, 30 P.2d 1031; *People v. Arnest*, 1933, 133 Cal.App. 114, 23 P.2d 812; *People v. Wagner*, 1926, 78 Cal.App. 503, 248 P. 946; *People v. Foster*, 1934, 3 Cal.App.2d 35, 39 P.2d 271; *People v. Hayes*, 1934, 3 Cal.App.2d 59, 39 P.2d 213; *People v. D'A Philippo*, 1934, 220 Cal. 620, 32 P.2d 962.

(4) In other cases the order was similar to (3) above but also remanded the cause for a new trial on the issue of the challenged prior conviction. *People v. Willison*, 1931, 116 Cal.App. 157, 2 P.2d 543; *People v. Darling*, 1932, 120 Cal.App. 453, 7 P.2d 1094.

[5] Orders of types (1) and (2) above have been justified³ on the ground that the

2. E.g., habitual criminal, harboring, house of ill fame; bigamy, blackmail, bookmaking, bribery, burglary; lewdness, lascivious conduct, libel, lottery.

3. The order in *People v. Chadwick*, *supra*, was given without any discussion of alternatives or citation of authority, and

the procedure adopted there was followed in *People v. Carrow*, *supra*. In *People v. Richardson*, *supra*, there was no alternative to a new trial on all issues since the reviewing court found errors in the proof of the primary offenses as well as in that of the prior convictions charged.

prior conviction charge is one of the issues in the trial for the new offense and should be passed upon by the same jury that passes on the question of guilt of the new offense. Thus, in *People v. Nicholson*, supra, 34 Cal. App.2d 327, 333, 93 P.2d 223, 229, the court said: "The proving of such prior convictions is a statutory proceeding and since the amendment of section 969a of the Penal Code, in 1931, there is no statutory authorization for passing upon the question as to whether such convictions have been suffered other than in connection with the new offense charged and by the same jury. *People v. Ysabel*, [1938] 28 Cal.App.2d 259, 82 P.2d 476." The reasoning is erroneous in so far as it requires a new trial on all issues in cases where on appeal the error found is confined to the prior conviction charge. The court in the *Nicholson* case adopted an argument made in *People v. Ysabel*, supra, but the latter case was not in point. The controlling question there was the propriety of the trial court's action in pronouncing judgment on the primary offense and ordering the defendant *Ysabel* held for further trial on the prior conviction charges after discharging the jury, which found the defendant guilty of the primary offenses charged but could not agree on the prior conviction charges. Upon retrial, before a different judge, the court entered an order granting defendant *Ysabel*'s motion to "dismiss all further proceedings." The order was affirmed on appeal. The appellate court reasoned that Penal Code, section 969a, as amended in 1931, Stats.1931, p. 1060, indicated a legislative purpose to have prior conviction charges considered only in connection with the primary offenses charged. The 1931 amendment to section 969a deleted a provision permitting the filing, at any time after judgment and before sentence had expired, of a supplemental indictment or information to charge newly discovered prior convictions. As amended, the statute relates only to the amendment of a pending indictment or information to add new prior conviction charges before verdict, *People v. Houston*, 1937, 24 Cal.App. 2d 170, 74 P.2d 517; *People v. Louviere*,

1939, 34 Cal.App.2d 62, 93 P.2d 179, and all charges made before that time would of course be tried by the same jury that tried the primary offenses charged. The legislative purpose expressed in the section, and in the 1931 amendment, was to fix a time after which no further charges could be made. The section has no bearing on the procedure to be followed on appeal when the evidence is found insufficient to support a finding that there was a prior conviction.

[6] When the sole question on remand from an appellate court involves the proof of an alleged prior conviction, there is no reason to require the parties to retry the question of guilt of the primary offenses when the correctness of the determination of this question is not challenged by either party. There is nothing prejudicial involved in a limited new trial on the issue of the challenged prior conviction by a jury different from that which tried the issue of guilt of the primary offenses. That issue and the proof of prior convictions are clearly severable. In re *McVickers*, supra; In re *Seeley*, 29 Cal.2d 294, 176 P.2d 24; *People v. Carrow*, supra. Proof of prior convictions or the adjudication that the defendant is an habitual criminal do not involve substantive offenses, but merely provide for increased punishment of those whose prior convictions fall within the scope of these statutes. In re *McVickers*, supra, 29 Cal.2d 264, 270-271, 176 P.2d 40, 44-45, and references cited there. The important relation between the primary offenses and the prior convictions charged is, therefore, the sentence to be imposed, and the jury does not participate in that.

In most of the cases where orders of type (3) were given, a new trial limited to the issue of the alleged prior conviction could not cure the defect in proof because the offense for which the conviction was suffered was not one of those enumerated in Penal Code, section 644, *People v. Morrison*, supra; *People v. Shaw*, supra; *People v. Lohr*, supra; *People v. Pace*, supra; *People v. D'A Philippo*, supra; *People v. McChesney*, supra, or the prior convictions were not alleged in the information, *People v. Murray*, supra; *People v. Wagner*, su-

pra, or the allegation was defective, *People v. Arnest*, supra, or the jury did not make the specific finding required by Penal Code, section 1158, *People v. Eppinger*, supra. In such cases an order of type (3) was proper. In two of these cases, *People v. Hayes*, supra; *People v. Foster*, supra, however, it might have been possible to cure the defective proof on a retrial, but there was no suggestion of a limited new trial on the issue of the challenged prior conviction in either of them.

In urging that the order should follow type (3) above, defendant, relying on *In re McVickers*, supra, and *In re Seeley*, supra, contends that had he not appealed but waited instead for the judgment to become final and then petitioned for habeas corpus, that part of the judgment adjudging him an habitual criminal would have been nullified and there would have been no new trial on the issue of the alleged second prior conviction, whereas if this court now orders a new trial on that issue he will be penalized for having appealed. The cases on which defendant relies do not support his contention. They decided that "a petitioner may * * * secure relief in habeas corpus from an erroneous adjudication of habitual criminal status where the facts * * * show that as a matter of law the prior conviction is of a crime which does not meet the definition of an offense included in said section 644." *In re Seeley*, supra, 29 Cal.2d 294, 299, 176 P.2d 24, 28. Those cases did not decide that habeas corpus is available to review the sufficiency of the evidence to support a finding that a petitioner had suffered a prior conviction, nor did they decide that a new trial would be improper if a defect in proof were found that would be amenable to correction on retrial.

In the two cases giving orders of type (4), the defects in the proof of the prior convictions were capable of correction on a retrial. *People v. Willison*, supra; *People v. Darling*, supra. In both cases, the appellate court reversed the judgment and the

order denying the defendant's motion for a new trial in so far as they related to the challenged prior convictions. This procedure is the proper one. It carries out the policy of the statutes imposing "more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment", *In re McVickers*, supra, 29 Cal.2d 264, 270, 176 P.2d 40, 45, and prevents defendants from escaping the penalties imposed by those statutes through technical defects in pleadings or proof. It affords the defendant a fair hearing on the charge, and if it cannot be proved he will not have to suffer the more severe punishment.

[7] Defendant was sentenced to serve consecutive terms on the four primary counts of which he was found guilty. Since "it cannot be assumed that the court disregarded any portion of the verdict in fixing the term of imprisonment * * *", *People v. Chadwick*, supra, 4 Cal.App. 63, 74, 87 P. 384, 388, 389, it cannot be said that the finding that defendant had suffered two prior convictions did not influence the trial court in sentencing defendant to consecutive rather than concurrent terms. Defendant should, therefore, be resentenced after the conclusion of the limited new trial on the issue of the challenged prior conviction.

That part of the judgment adjudging defendant an habitual criminal and imposing sentence and the order denying defendant's motion for a new trial on the issue of the alleged second prior conviction are reversed, and the cause is remanded to the trial court with directions to resentence defendant after the conclusion of the limited new trial.

GIBSON, C. J., and SHENK, CARTER and SCHAUER, JJ., concur.

EDMONDS and SPENCE, JJ., concur in the judgment.

120 Cal.App.2d 435

FOSTER v. KEATING.

Civ. 15398.

District Court of Appeal, First District,
Division 1, California.

Sept. 29, 1953.

Action sounding in fraud, seeking damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship. The Superior Court, City and County of San Francisco, entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that court's separation of issues and direction that order of proof would be determination of relationship between the parties first and determination of the financial aspects later, had legal effect of casting duty upon defendant to refrain from going fully into financial aspects until relationship had been determined, coupled with right after such determination to complete the presentation of his case by adducing evidence bearing on financial aspects, and court's refusal, after determination of the relationship, to grant defendant's motion to reopen case so that he might complete his proof prevented defendant from presenting his defense in respect to damages, and constituted prejudicial error.

Judgment reversed with directions.

I. Pleading ⇨248(13)

Where complaint sounding in fraud and seeking damages for wrongful conversion of a joint venture business in gross violation of fiduciary relationship, upon which case was tried, was amended to conform to proof, and amended complaint likewise sounded in fraud and dealt with the same series of transactions as did the first complaint, differing merely in advancing date of inception of plot and in characterizing the joint venture agreement as one of the steps taken by defendant in accomplishing his plan to convert plaintiff's business and assets to his own use, second amended complaint was not founded upon a new or different cause of action than that stated in first complaint, and was properly allowed.

2. Joint Ventures ⇨4(1)

When parties become joint venturers they acquire rights and subject themselves

to duties growing out of fiduciary relationship which they have thus created.

3. Fraud ⇨7

An action in fraud for damages may lie even if relationship is not confidential or fiduciary in the strict legal sense of that term, and extends to every possible case in which a fiduciary relation exists as a fact, and such relation need not be legal, but may be moral, social, domestic, or merely personal.

4. Fraud ⇨52

In action of fraud seeking damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship, evidence of conversations of parties prior to signing of written agreement respecting plaintiff's business was relevant to issue of creation and existence of the confidential and fiduciary relationship, and was properly admitted.

5. Joint Ventures ⇨1.10

A joint venture may be formed by parol or it may be inferred from acts and declarations of the parties.

6. Fraud ⇨54

In action of fraud seeking damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship, evidence of falsity of some of defendant's representations, evidence that he made promises which he never intended to keep, and evidence of defendant's misappropriation of another business by strikingly similar methods, bore upon defendant's intent to convert plaintiff's business to his own sole use and benefit, and was properly admitted.

7. Appeal and Error ⇨1047(4)**Trial** ⇨59(1), 66

In action sounding in fraud, seeking damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship, court's separation of issues and direction that order of proof should be determination of relationship first and determination of financial aspects later, cast duty upon defendant to refrain from going fully into financial aspects until relationship between parties had been determined, coupled with

right, after such determination, to complete presentation of his case by adducing evidence bearing on financial aspects, and court's refusal, after such determination, to grant defendant's motion to reopen case so that he might complete his proof, prevented defendant from presenting his defense in respect to damages, and constituted prejudicial error.

8. Evidence ⇨99, 143, 148

A party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings.

9. Trial ⇨59(2)

It is within sound discretion of trial court to define issues and direct order of proof, but that may not be done so as to preclude a party from adducing competent, material, and relevant evidence which tends to prove or disprove any material issue.

10. Pleading ⇨252(2)

Where, after case was tried on first amended complaint, a second amended complaint was filed, pursuant to permission properly granted, to conform to proof, the second amended complaint defined the issues.

11. Fraud ⇨58(4)

In action sounding in fraud, seeking damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship, evidence sustained finding that a joint venture was formed with respect to plaintiff's business, upon the terms and conditions of promises and representations which defendant made to plaintiff, and that plaintiff was fraudulently induced by defendant to sign the joint venture agreement prepared and designed by defendant as a part of his scheme to appropriate plaintiff's business.

12. Joint Ventures ⇨1.8

A joint venture may exist notwithstanding fact that parties have unequal control of operations.

13. Joint Ventures ⇨1.14

Where one joint venturer induced the other to mark the joint venture agreement canceled upon the assurance and understanding that the relationship of the parties would not be disturbed thereby, cancellation of the joint venture agreement was not thereby effectuated, and whether representations which induced the one so to act were of law or of fact was immaterial in view of confidential and fiduciary relationship between the parties.

14. Joint Ventures ⇨1.14

Cancellation of joint venture agreement, fraudulently induced, would not necessarily terminate fiduciary relationship existing between joint venturers.

15. Fraud ⇨60

In action sounding in fraud, seeking damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship arising from a joint venture, separate assessment of various elements of damages was not required, where damage alleged was a lump sum as the monetary measure of loss caused by defendant's misappropriation and conversion of the business as a whole.

16. Damages ⇨89(2)

If action is one in tort, exemplary damages may be recovered upon a proper showing of malice, fraud or oppression, even though the tort incidentally involves a breach of contract.

17. Appeal and Error ⇨1178(6)

Where judgment awarding both compensatory and exemplary damages was reversed and the cause remanded for redetermination of the compensatory damages, element of exemplary damages was required to be redetermined as well. Civ. Code, § 3294.

John A. Sinclair, San Francisco, Dan L. Garrett, Jr., San Francisco, for appellant.

Morris Lowenthal, Juliet Lowenthal, San Francisco, Karl D. Lyon, San Francisco, of counsel, for respondent.

FRED B. WOOD, Justice.

The defendant, A. G. Keating, has appealed from a judgment which awards the plaintiff, Harry E. Foster, \$31,440 as compensatory or general damages and \$9,500 as exemplary damages.

The judgment is based upon findings of fact which may be summarized as follows:

I. Commencing November, 1949, plaintiff owned a lumber yard and planing mill at Fulton, owned and conducted a sawmill business as sublessee of a sawmill near Cazadero, California, and had a timber contract relative to timber on the sawmill property. By the middle of April, 1950, he had invested more than \$8,000 in the mill and yard, in addition to personal labor contributed by him.

II. Commencing in May, 1950, and continuing until this action was filed, defendant deliberately and in bad faith conceived, formulated and continuously engaged in a course of conduct, secretive and otherwise, for the purpose of acquiring and appropriating to himself all of the business and assets of plaintiff and of eliminating plaintiff therefrom, committing the following acts of misconduct, among others, against plaintiff:

(1) From about May 1, to June 2, 1950, he importuned plaintiff to become associated with him in a joint venture for the conduct and expansion of said business; then and subsequently representing that he had formerly been a major-general in the army and had wide experience as head of the Mining Division of the War Production Board during the recent world war, had very substantial wealth and a high credit rating which he was willing to employ for the benefit of plaintiff's business and would finance, remodel and expand the business so it could pile up logs for winter and permit year round operation; that if plaintiff would agree to enter into a joint venture with him for said purpose, he would pay all the then outstanding debts of the business and all future liabilities of the joint venture and invest \$10,000 immediately for that purpose and for supplying additional capital; that within 60 days after

entering into such venture, he would form a corporation for the operation of the business, that until formation of the corporation plaintiff would manage production and receive \$350 per month while defendant would handle sales and plaintiff would additionally receive 5 percent of the gross amount of the sales of the processed lumber; that upon formation of the corporation plaintiff would continue to receive \$350 per month as production manager and a 35 percent interest in the corporate stock, defendant to receive 65 percent of the stock, and defendant would lend the corporation all necessary capital.

(2) Plaintiff believed all said representations and, relying upon them, agreed June 2, 1950, to enter into a joint venture for the conduct of said business. The agreement was made upon said terms and conditions, representations and promises and, in entering into the agreement, defendant agreed to carry out all of said representations and promises, to cooperate fully with plaintiff and exercise his best efforts, knowledge and experience and supply necessary funds and credits during the development and expansion of the business for their mutual benefit. It was further agreed that the business would be conducted under the name "Fulton Lumber Yard" and that all proceeds from sales would be collected by defendant and deposited in the Fulton Lumber Yard account in Exchange Bank at Santa Rosa.

(3) Said representations were false and fraudulent. At no time did defendant intend to carry them out; instead, he made them for the sole purpose ultimately to appropriate said business and assets for himself and to the exclusion of plaintiff, under the guise of a joint venture agreement designed by him to induce plaintiff to turn full control of the business over to defendant. As a part of said scheme defendant induced plaintiff June 2, 1950, to execute and deliver to defendant a written agreement and power of attorney, but both documents were prepared and designed by defendant as a part of said scheme, with no intent to assume any of the obligations expressly or impliedly contained in the written agreement.

(4) Commencing in the middle of May, 1950, defendant undertook the management and operation of the business, made all sales, took all proceeds of sales and also the proceeds of plaintiff's accounts receivable collected by defendant, such proceeds exceeding \$30,000, and deposited them in his personal bank accounts in San Francisco and Oakland, instead of in the Fulton Lumber Yard account in Santa Rosa. From those proceeds he paid but a portion of the obligations of the business and failed to pay the rental on the sawmill which accrued between November, 1949, and June, 1950, also all bills incurred by defendant after June 1, 1950, totaling at least \$5,000. He sold the lumber of the business under the name of "Port Lumber Company" and incurred obligations in the operation of the business under the name "Fulton Lumber Yard," so they would appear to be solely the obligations of plaintiff. At all times until shortly before filing this action, plaintiff believed defendant had carried out his said promises and agreements and had paid said bills and liabilities.

(5) In June, 1950, defendant, unknown to plaintiff, seized all plaintiff's documents concerning the mill and yard, including the sublease of the mill, the joint venture agreement and power of attorney, a logging contract with one Gould, and documents in connection with the use of a tractor, documents necessary to enable plaintiff to establish his rights and interests in the business. He withheld the same to preclude plaintiff from asserting and proving his rights and interests and to prejudice plaintiff's financial position. Defendant intentionally kept all records of the business under his supervision and management, placing therein only the data he felt necessary to paint the picture in a light most favorable to him, making up the records and confusing the operations with records pertaining to activities of his own business and to make it impossible for plaintiff or anyone else to detect the true facts.

(6) Defendant failed to pay any money into said business (by way of investment or otherwise), for the purpose of creating a false impression in the minds of creditors, customers and others that plaintiff was

"broke"; falsely representing to creditors of plaintiff and of the business that the bills and obligations which defendant had agreed to pay were the sole liability of plaintiff, that plaintiff was without assets, was irresponsible and "broke," and that they should do business solely with defendant since he had superior assets and financial responsibility. He conducted the business in an inefficient manner, to prevent it from being as successful and profitable as it would have been without his influence and management, and to discourage plaintiff and deprive plaintiff of the fruits of the business, while plaintiff was doing all in his power to procure logs and carry on production.

(7) In August, 1950, defendant gradually engaged in a more direct course of conduct intended to eliminate plaintiff from all activity in the business, gradually excluding plaintiff from all its affairs, withholding information and excluding plaintiff from access to the books, records and office of the business. August 28, 1950, defendant represented to plaintiff that by reason of claims of creditors of plaintiff's lessor of the sawmill site, defendant's investment in the business (which investment he had not made) and his other resources might be jeopardized, and to avoid such, it was necessary to cancel as of July, 1950, the June agreement and power of attorney on the face thereof but without terminating the relationship between plaintiff and defendant, and assured plaintiff he would fully perform the promises made by defendant at the time of entering into said arrangement. Plaintiff, believing and relying upon said representations, cancelled said June, 1950, documents and did not discover the falsity of said representations until shortly before filing of this action. At the time of said cancellation, defendant had no intention of continuing in any joint venture with plaintiff. He sought merely to obtain such documents back from plaintiff and thus enable defendant to claim that the joint venture, supposedly in existence, had been mutually terminated and that defendant was free to appropriate the assets thereof. Defendant also informed plaintiff that further to prevent such jeopardy of defendant's

investment it was necessary that defendant procure new documents granting the supposed joint venture a new lease on the mill and the right to purchase machinery and equipment there, to be executed in defendant's name alone but to be held for the joint and mutual benefit of plaintiff and defendant. Thereupon defendant obtained such documents in his own name, telling plaintiff he had obtained them and would hold them for their mutual benefit as part of the joint venture. At no time did he intend to so hold them; instead, he intended to hold them solely for his own benefit. Plaintiff believed and relied upon such representations until shortly before filing this action, at which time defendant was asserting that plaintiff had no interest in said documents.

(8) Defendant converted to his own use and benefit all of the logs, lumber, and gasoline at the mill and yard, the equipment and assets at the mill, the leases, timber and logging contracts, money and proceeds of the business. He failed to pay and make returns on sales and withholding taxes and permitted the unemployment insurance policy to lapse. Twice after the filing of this action defendant purported to sell the business, receiving \$1,000 on one sale and making a second agreement of sale, presently in effect, which calls for the payment to defendant of \$7,000, in addition to the assumption of defendant's obligation to pay the lessor \$7,000.

III. By reason of said acts and misconduct plaintiff was deprived and stripped of his principal assets: His investment in the sawmill, his lease of the sawmill and the right to purchase equipment and machinery thereat, the proceeds of sales of the business, the logging contracts, and all other assets of the business, to his damage in the sum of \$31,440.

IV. In doing all of the foregoing acts of misconduct, defendant acted maliciously and with the purpose of preying on small businesses such as plaintiff's and to injure, damage and destroy plaintiff in his business, his good name and reputation. Defendant carried out said intent and purpose of appropriating plaintiff's assets and business through the flagrant, aggravated, wan-

ton and reckless abuse of the confidence reposed in him by plaintiff and through the use of artifice, trickery, deceit, misrepresentation, falsehoods, coercion, and gross oppression. Defendant's misconduct toward plaintiff was not an isolated transaction but was connected with and was the precise design and pattern used by defendant during March, April, and May, 1950, in stripping one Edward Bell of Bell's Lumber Yard at Oakland. In the Foster and Bell transactions, defendant's object was first to "acquire," without risk or expense a retail outlet for lumber (Bell's Lumber Yard had been the sole outlet for plaintiff's mill) and then to acquire the primary source of lumber supply for the yard (plaintiff's mill, business, and assets) by taking advantage of the need of Bell and plaintiff for working capital and worming himself into their confidence. Defendant succeeded in said object by misrepresentation, falsehoods, trickery and deceit, and in a cold, calculating, ruthless manner stripped plaintiff and Bell of all their profit. Wherefore, plaintiff is entitled to \$9,500 as exemplary damages.

V. At all times plaintiff devoted his entire time, efforts, knowledge and experience to the business and performed all conditions and promises on his part and at no time breached any of his promises or obligations.

From the facts found, the court drew these conclusions of law: (a) defendant became trustee for plaintiff in respect to all of plaintiff's property, business and assets; (b) as such trustee he was obligated to hold and conduct the same for the sole benefit of plaintiff and was precluded from profiting therefrom to his own advantage; (c) in view of the violation and breach of defendant's trust, confidential and fiduciary duty to plaintiff, plaintiff is entitled to recovery against defendant for the value of all property and assets and proceeds appropriated and converted by defendant, together with all other damages and losses sustained by plaintiff as a result of defendant's misconduct, including losses and damages sustained by reason of defendant's failure to pay the obligations and liabilities of plaintiff's business and his

conversion and appropriation of plaintiff's property and assets and the proceeds of plaintiff's business, including the value of all expenditures and investments of plaintiff in the property; (d) plaintiff is entitled to judgment for \$31,440 as compensatory or general damages and \$9,500 as exemplary damages.

In support of his appeal defendant claims: (1) Evidence of conversations between the parties prior to the execution of the written agreement of June 2, 1950, was admitted in violation of the parol evidence rule; (2) plaintiff was allowed to file an amended complaint setting up a new or different cause of action, based upon evidence erroneously admitted; (3) the court prevented defendant from proving his defense; (4) the finding that a joint venture existed is not supported by the evidence; (5) the court erroneously failed to find that the agreement of June 2, 1950, was later cancelled; (6) the award of \$31,440 compensatory damages is erroneous because not itemized in the findings and not supported by the evidence; and (7) the award of exemplary damages is erroneous because the asserted breach was of obligations arising out of a contract.

(1) The admission of evidence of conversations which occurred prior to execution of the written agreement and (2) the permission to file an amended complaint are closely interrelated and will be considered together.

The case was tried upon an amended complaint. When the evidence was in and counsel had orally argued the case, the court announced its decision. Thereafter and before findings of fact had been prepared and filed plaintiff moved for and was granted leave to file a second amended complaint, to conform to proof.

The facts alleged in the second amended complaint were substantially the same in all respects as the facts found by the court.

1. The second, third, and fourth causes of action of the first amended complaint (omitted from the second amended complaint) were respectively, (1) to impress a trust, for the mutual benefit of plaintiff and defendant, upon the assets allegedly held in trust by the defendant for the benefit of the joint venture; (2)

The second amended complaint did not set up a new or different cause of action. It followed, in large part, the allegations of the first cause of action¹ stated in the first amended complaint, which also sounded in tort, the fraudulent misappropriation and conversion of plaintiff's business, properties and assets, in violation of trust and of a confidential and fiduciary relationship.

The second amended complaint was essentially the same as the first count of the first amended complaint save that it alleged that defendant conceived and entered upon the accomplishment of his plan of misappropriation and conversion in May of 1950, orally inducing plaintiff to enter a joint venture, preparing and inducing plaintiff to sign a written agreement (which omitted various of the oral stipulations and included provisions inconsistent with the oral).

The first count of the earlier complaint, instead, laid the plot as commencing early in June, "at or about the inception of the joint venture." But from that point on, chronologically, the first count alleged essentially the same facts as did the final complaint; e. g., the facts narrated in paragraphs 4, 5, 6 (except the last sentence of 6), 7 and 8 (except defendant's two sales of the business, which occurred after the filing of the action) of paragraph II of our summary of the findings of fact, and in paragraphs III and IV (except the Keating-Bell transaction) of the summary, with but minor differences in the specification of the details of the alleged transactions.

The first count alleged the facts recited in paragraph 1 of paragraph II of our summary without characterizing defendant's promises and representations as fraudulently made. It alleged the provisions of the joint venture agreement in the terms of those promises and representations, adding that in May of 1950, a written agreement "purportedly" containing those promises was executed by the parties effective June

to enjoin alleged threatened continuance of acts allegedly injurious to plaintiff and the joint venture business; (3) to recover damages for alleged violations of the joint venture agreement and refusal of defendant to make an accounting to plaintiff of the transactions of the joint venture business.

1, but that plaintiff's only copy thereof was subsequently taken by defendant, without plaintiff's consent and remained in the possession of defendant, who refused to return it. The first count also alleged that at the time of the first association of the parties in the joint venture, and continuously thereafter, each owed to the other "undivided and highest loyalty and utmost good faith, and occupied a fiduciary, confidential and trust relationship to each other."

[1] The conclusion is irresistible that the second amended complaint was not founded upon a new or different cause of action than that stated in the first amended complaint.

[2,3] The first complaint sounded in fraud and sought damages for wrongful conversion of a joint venture business in gross violation of the fiduciary relationship. That was a cause of action comparable to that in *Elsbach v. Mulligan*, 58 Cal. App.2d 354, 136 P.2d 651, recovery of damages against a coadventurer for fraudulently inducing certain agencies to terminate their contracts with a corporation organized to carry out the joint venture agreement. See, also, *Sime v. Malouf*, 95 Cal.App.2d 82, 94-101, 212 P.2d 946, 213 P.2d 788. When parties become joint venturers they acquire rights and subject themselves to duties growing out of the fiduciary relationship which they have thus created. *Pacific Atlantic Wine, Inc., v. Duccini*, 111 Cal.App.2d 957, 965-966, 245 P.2d 622. An action in fraud for damages may lie even if the relationship is not confidential or fiduciary in the strict legal sense of that term. It has been extended "to every possible case in which a fiduciary relation exists as a fact. Such relation need not be legal; it may be moral, social, domestic, or merely personal." *Bank of America v. Sanchez*, 3 Cal.App.2d 238, 243, 38 P.2d 787, 789.

The second complaint likewise sounded in fraud. It sought damages for wrongful conversion of plaintiff's business in gross violation of a confidential and fiduciary relationship. It dealt with the very same series of transactions as did the first complaint. It differed merely in advancing the date of inception of the plot

and in characterizing the joint venture agreement as one of the steps taken and devices used by the defendant in accomplishing his plan to misappropriate and convert plaintiff's business and assets to his own use.

Nor was defendant misled concerning the issues of fraud presented by the first count of the first amended complaint. He had joined issue by his answer, and plaintiff's counsel, at the very beginning of the trial, made it clear that he was trying the case on the theory of conversion of the business in violation of a fiduciary relationship, citing *Elsbach v. Mulligan*, 58 Cal. App.2d 354, 136 P.2d 651, as a leading case of this type. In a discussion which developed during the examination of the first witness, plaintiff's counsel said, "The evidence will show that even before the contract was drawn, there was that [fiduciary] relationship." And defendant met those issues fully, through cross-examination and by his own witnesses.

Ample precedent for allowing amendments to conform to proof, in such a case, is furnished by *Klopstock v. Superior Court*, 17 Cal.2d 13, 19-23, 108 P.2d 906, 135 A.L.R. 318; *Valencia v. Shell Oil Co.*, 23 Cal.2d 840, 848-849, 147 P.2d 558; *Hayes v. Richfield Oil Corp.*, 38 Cal.2d 375, 382, 240 P.2d 580; *Carman v. Athearn*, 77 Cal.App.2d 585, 594-595, 175 P.2d 926.

But, says the defendant, plaintiff's shift of position from the first to the second amended complaint was based upon evidence erroneously introduced in violation of the parol evidence rule, evidence of the conversations of the parties prior to the signing of the written agreement. That is not correct. The trial judge expressly stated he was not admitting that testimony to vary the terms of the writing.

[4,5] That testimony was relevant to the issue of the creation and existence or nonexistence of a confidential and fiduciary relationship between the parties. We find nothing in the written agreement that would preclude the use of extrinsic evidence to show that it represented a joint venture. By its terms defendant agreed to form a corporation and plaintiff agreed to convey his business to the corporation;

defendant to supply the corporation with cash capital of not less than \$5,000; the stock of the corporation to issue 65 percent to defendant and 35 percent to plaintiff; pending incorporation, defendant to advance such sums as he deemed necessary to finance plaintiff's operations and to have the right to purchase the entire output at cost plus 5 percent of his resale prices; plaintiff to give defendant a general power of attorney to collect all moneys then thereafter owing to plaintiff and to operate the business in all respects; plaintiff to devote his entire time to the business and receive \$300 a month out of income. It is not uncommon for coadventurers to form a corporation for the conduct of their operations. A joint venture may be formed by parol or it may be inferred from the acts and declarations of the parties. *Nelson v. Abraham*, 29 Cal.2d 745, 749, 752-754, 177 P.2d 931. See also *Fitzgerald v. Provines*, 102 Cal. App.2d 529, 536, 227 P.2d 860; and *Milton Kauffman, Inc., v. Superior Court*, 94 Cal. App.2d 8, 17, 210 P.2d 88.

Evidence of those conversations was also relevant to the issue framed by the allegations of the first complaint, and the denials of the answer, to the effect that defendant induced in plaintiff complete and trusting personal confidence in defendant's every word and deed. That, if proved, would furnish a basis for an inference of a personal confidential relationship which would impose duties upon defendant comparable to those which inhere in a fiduciary relationship in the strict legal sense of the term.

[6] The evidence of the falsity of some of defendant's representations, the evidence that he made promises which he never intended to keep, and the evidence of defendant's misappropriation of the Bell Lumber Yard business by strikingly similar methods, bore upon the character and quality of defendant's conduct (his intent to convert plaintiff's business to his own sole use and benefit) commencing at or about the time of the signing of the written agreement and continuing until suit filed.

That evidence, properly admitted, supports the inference that defendant conceived his plan of misappropriation early

in their dealings instead of the time of signing the agreement.

We conclude that the evidence was properly admitted and the amendment was properly allowed.

(3) *Was defendant prevented from presenting his defense?*

Defendant claims that he was prevented from fully presenting his defense because early in the trial and consistently throughout its course the court ruled that consideration of the details of the financial transactions should await determination of the question whether there was a joint venture and then if an accounting were necessary the financial details would be considered; that defendant acceded to that ruling but at the conclusion of the trial the court announced an accounting was not necessary; that defendant then moved to reopen the case, and his motion was denied.

Plaintiff contends that defendant was not curtailed in the presentation of his defense; that the court admonished the parties to put their books of record in evidence so that they would be available to the accountant if an accounting were found necessary; that though defendant produced his records he only put a part of them in evidence, marking the others for identification; that when defendant raised this point at the conclusion of the trial the court ruled it would order an accounting if defendant wanted one, at the sole expense of defendant, but defendant did not accept the tender; that the motion to reopen was properly denied, as within the discretion of the court and because the contents of the books would not change the finding that defendant violated the confidence of the plaintiff, that the figures in the books could not produce a different result because the court had no confidence in defendant's integrity or in the book entries made by him or under his direction.

The problem is not so simple as plaintiff states it. The items in the books and other records might not have a bearing on defendant's conduct, as tortious or not, but they might well have a bearing on the amount of damages which plaintiff sustained. For example, one element of damage, was the value of logs processed at the mill, computed at 540,000 board feet, priced at \$60 per 1000

feet less \$34 per thousand feet as cost of production, totaling \$14,040. During the discussion of that item, defendant's counsel contended that the \$34 cost factor was predicated upon operation at full capacity whereas this mill was running but 50 percent of the time.

The real question is not whether the business records were accurate or the court would have confidence in them or, if accurate and relied upon by the court, they would or would not affect the result. The question is whether or not defendant's counsel may have refrained from tendering full proof in respect to the amounts of the various elements of damage in the belief that the question of liability was to be determined first, damages, if any, later.

Early in the trial, during the cross-examination of Keating under section 2055, when plaintiff's counsel asked him if he had any accounts charged in the name of the Fulton Lumber Company after June, the court said: "Counsel, wouldn't the books be the best evidence? You are asking general questions and getting general answers. If it is necessary to have an accounting and go into their books, the Court will have an accountant do it." Defendant's counsel stated he expected to have available the accountants who kept the books. Plaintiff's counsel then took up another line of inquiry.

When, later, one of those accountants, Mr. Claggett, was on the stand and had identified and described certain of the business records, plaintiff objected to his further testifying at that time and suggested that the case be first tried "on the merits" and that "at the close of the testimony on the merits, a day or so be allowed for the parties to examine the original records that are produced, and then a reconvening of the court, in which the parties who have examined them have a right to raise objections to those original records. If the Court can pass on the objections then and there, it should do so. If it is something only an accountant can pass on, the Court should give instructions to the accountant so that he can make a recommendation." In reference to that the court observed: "Then your suggestion is, I suppose, that you are apparently in agreement on this, that the question

should be first passed upon as to what the relationship is existing between these parties," and after further discussion, "I think an order of the court would be proper at this time, ordering both parties to produce all the original records they have and be prepared to give some explanation as to why they cannot be produced * * * after this discussion, Mr. Sinclair [counsel for defendant], do you still feel that Mr. Claggett at this time can offer some assistance to us?" Mr. Sinclair responded, "I don't know, your Honor, whether he can testify to anything today. I mean, assuming we are in agreement that there is to be an independent audit, then I would prefer to turn over the records to the auditors and let them work them out." By the court, "I think that would be better," and a little later, "why don't we keep as far away from the figures as we can and get in the actual legal relationship of the parties on the 23rd of September [the date suit was filed], and then the Court can make whatever determination necessary to bring the records before the Court if it is necessary to bring them?" and, after further discussion, "I think this case as a practical matter calls for an interlocutory judgment, the way I feel about it, and then certain other things come after it. I think we have to have an interlocutory judgment first, determining the relationship of these parties, and then what will follow depends upon that." Both counsel agreed and witness Claggett was excused.

Later Glenn Shrader, a witness for defendant, identified the books and described their preparation. Counsel for defendant then discontinued the inquiry, saying "I don't think I will pursue this any further, your Honor. I want to lay the foundation for the books, and if there is going to be an audit, why, I think that is—I think what he has said is sufficient. I think that's all."

Plaintiff introduced in evidence certain bills incurred in the name of Fulton Lumber Company during defendant's management of the business, bills which plaintiff testified had not been paid, so far as he knew. While defendant was on the witness stand, his counsel started to ask him about one of these bills and the following occurred: "The Court: Now, aren't we getting back

into the question of bills again? Those are bills against the Fulton Lumber Yard? Mr. Sinclair: Yes. The Court: Now, aren't we getting into the accounting angle of it again, Mr. Sinclair?" and defendant's counsel dropped the inquiry.

During the cross-examination of plaintiff, defendant's counsel asked him concerning certain bills he owed on June 1, 1950, and the amounts thereof, when the court interrupted, saying in part: "After all, isn't that what the accounting would show, if the Court decides an accounting is necessary in this? After all, I don't see what was owed or specific accounts owed would have any bearing on the relationship built up between Mr. Keating and Mr. Foster. That is a matter of negotiation between these parties, and I think we have wandered far from the actual meat of the situation, if the Court is going to make an interlocutory judgment which would outline what the Court feels the relationship between the parties were. I fear we are going into a lot of stuff that is wasted time, purely wasted," and "A lot of this * * * isn't going to help me in what I am going to have to decide, which is the relationship that existed between these parties." Thereupon, defendant's counsel dropped this line of inquiry. This incident is of special significance because one of the elements of damage awarded was an item of \$5,000 for obligations owed by plaintiff.

These and several other incidents of similar character convince us that counsel for defendant refrained from going fully into the financial aspects of the situation at this stage of the trial in the reasonable belief that he would have an opportunity to do so after the relationship between the parties had been determined.

[7] It may well be that an accounting was not necessary to aid the court in assessing damages for conversion of plaintiff's business, as distinguished from the accounting that might have been necessary if the court had found that defendant still held the business, as trustee or as coadventurer, for the mutual benefit of the parties. However, the separation of the issues and the direction of the order of proof (determination of the relationship first, the financial aspects later) had the legal effect of casting a duty

upon the defendant to refrain from going fully into the financial aspects until the relationship between the parties had been determined, coupled with the right after such determination to complete the presentation of his case by adducing evidence bearing on the financial aspects, whether that should take the form of an accounting or the assessment of damages without an accounting. When the court later decided it was a case for the assessment of damages, not an accounting, and tendered defendant an accounting, at his sole expense, defendant had the alternative of moving to reopen the case to complete his proof in the customary manner, the presentation of testimonial and documentary evidence.

[8,9] "A party is entitled to have received in evidence and considered by the court, before findings of fact are made, all competent, material, and relevant evidence which tends to prove or disprove any material issue raised by the pleadings. [Citations.]" *Bole v. Bole*, 76 Cal.App.2d 344, 345-346, 172 P.2d 936, 937. It is within the sound discretion of the trial court to define the issues and direct the order of proof but that may not be so done as to preclude a party from adducing competent, material, and relevant evidence which tends to prove or disprove any material issue. *Pastene v. Pardini*, 135 Cal. 431, 432-433, 67 P. 681; *Everts v. Matteson*, 21 Cal.2d 437, 450, 132 P.2d 476; *Lawless v. Calaway*, 24 Cal.2d 81, 91, 147 P.2d 604; *Theatrical Enterprises, Inc., v. Ferron*, 119 Cal.App. 671, 677, 7 P. 2d 351; *Weinberg v. Dayton Storage Co.*, 50 Cal.App.2d 750, 759-760, 124 P.2d 155.

We conclude that prejudicial error occurred in the denial of defendant's motion to reopen the case.

(4) *Was the finding that a joint venture agreement existed supported by the evidence? Yes.*

[10] Under this heading, defendant uses the first count of the first amended complaint and ignores the second amended complaint, as defining the issue. The latter, which was filed pursuant to permission properly granted, furnishes the test. See *O'Melia v. Adkins*, 73 Cal.App.2d 143, 147, 166 P.2d 298; *Valencia v. Shell Oil Co.*, supra, 23 Cal.2d 840, 848-849, 147 P.2d 558.

[11] The second amended complaint alleged and the court found the formation of a joint venture upon the terms and conditions of the promises and representations which defendant made to plaintiff prior to June 2, 1950, and that plaintiff was fraudulently induced by defendant to sign the writing of June 2, which was prepared and designed by defendant as a part of his scheme to appropriate plaintiff's business. (See paragraphs 1, 2 and 3 of paragraph II of our summary of the findings.)

[12] Defendant further contends that there can not be a joint venture where the parties have unequal control of operations. That is not the law. See *Sime v. Malouf*, supra, 95 Cal.App.2d 82, 95-96, 212 P.2d 946, 213 P.2d 788.

Other phases of this argument were considered and decided in our discussion of the propriety of the amendment to conform to proof.

(5) *Did the court erroneously fail to find that the agreement of joint venture was later cancelled? No.*

[13] We find no substance in this point. The court found upon substantial evidence that late in August, 1950, defendant induced plaintiff to mark the writing of June 2 cancelled as of July, upon the assurance and understanding that the relationship of the parties would not be disturbed thereby. (See paragraph 7 of paragraph II of our summary of the findings.)

Whether the representations which induced plaintiff so to act were of law or of fact is immaterial in view of the confidential and fiduciary relationship.

[14] Even if there had been a cancellation, fraudulently induced, without assurance of a continuation of the joint venture, the fiduciary relationship would not necessarily have been terminated. See *Sime v. Malouf*, supra, 95 Cal.App.2d 82, 99, 212 P.2d 946, 213 P.2d 788.

Moreover, it would seem legally competent for the parties to an instrument to endorse it "cancelled" without effecting a cancellation, if they orally agree that such endorsement is not intended to and shall not operate as a cancellation. The parties named in a writing couched as a con-

tract may sign it without its taking effect as a contract if that be their intention. See *Spade v. Cossett*, 110 Cal.App.2d 782, 784, 243 P.2d 799, and authorities there cited.

(6) *Was the award of compensatory damages erroneous because not itemized in the findings and because, as defendant claims, not supported by the evidence?*

We need not consider the sufficiency of the evidence to support the compensatory damages awarded because, as we have found, the issue of compensatory damages must be retried.

[15] As to itemization of damages in the findings, it appears that the law does not require the separate assessment of the various elements of damages in such a case as this. In *Elsbach v. Mulligan*, 58 Cal. App.2d 354, at page 368, 136 P.2d 651, 659, the court held that there was "no merit in the suggestion that the court should have separately assessed the amount of damages resulting from the loss of the Mumm and McCallum agencies. The action concerns the loss of 'agencies', and their acquisition by Mulligan by means of a series of acts inextricably woven as to the two—varying at times, but always designed to accomplish one purpose, namely, the promotion of his own interest to the detriment of plaintiff." We think that principle obtains here.

Defendant relies upon a number of cases which hold that where a party alleges special damages, by separate items, and the opposite party joins issue, there must be a special finding on each. One such case is *James v. Haley*, 212 Cal. 142, 146, 297 P. 920, in which the plaintiff specially and separately pleaded that he had been damaged \$500 a month for loss of advertising space, \$500 for expenditure for additional billboards, \$25,000 for loss of patronage because of loss of view and light, and \$500 a month by reason of being excluded from three-quarters of his leased premises.

That is not our case. It is true that in his second amended complaint plaintiff stated that he invested \$8,000 in the business in addition to his personal services; that he was to receive \$350 a month for his services as production manager; that defendant

collected proceeds of sale and accounts receivable in excess of \$35,000 and used only a portion of said proceeds to pay obligations of the business; that defendant failed to pay bills incurred before and after June 1, 1950, to the amount at least of \$5,000; and that defendant twice sold the business, one time for \$1,000 and the other for \$7,000 in addition to the assumption by the purchaser of a \$7,000 obligation. But he did not assign those figures as items of special damages. They were but a part of his description of the business and of the dealings of the parties. The damage alleged was the lump sum of \$31,440, as the monetary measure of the loss caused by defendant's misappropriation and conversion of the business as a whole.

We observe, however, that the trial court in our case did at the conclusion of the trial disclose the basis of its findings of damage, in much the same manner as did the trial court in the Elsbach case. Similarly, in *Union Sugar Co. v. Hollister Estate Co.*, 3 Cal.2d 740, 750-751, 47 P.2d 273, and in *Staub v. Muller*, 7 Cal.2d 221, 229, 60 P.2d 283, the trial court furnished the basis upon which it computed the damages; by written opinion in the *Union Sugar* case, by oral statements upon denial of new trial in the *Staub* case. Such information is helpful upon review. Its furnishing is to be commended.

(7) *Was the award of exemplary damages predicated upon the breach of obligations arising from contract? No.*

Defendant contends that an "award of exemplary damages cannot be sustained, even though a fraud is involved, where such fraud is related to and affects obligations which arise from a contract," citing section 3294 of the Civil Code. (Appellant's Opening Brief, p. 100.)

[16] Here, again, defendant presses his contract theory of the action. This is an action in tort. As held in *Haigler v. Donnelly*, 18 Cal.2d 674, at page 680, 117 P.2d 331, at page 335, if "the action is one in tort, exemplary damages may be recovered upon a proper showing of malice, fraud or oppression even though the tort incidentally involves a breach of contract. *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 31 P. 1112,

33 Am.St.Rep. 157; *Lyles v. Perrin*, 119 Cal. 264, 51 P. 332; *Jones v. Kelly*, 208 Cal. 251, 280 P. 942; *Berning v. Colodny*, supra [103 Cal.App. 188, 284 P. 496]."

[17] However, the element of exemplary damages must be reopened for re-determination along with the compensatory damages.

The applicable statute declares that in an action for the breach of an obligation not arising from contract, "where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, *in addition to the actual damages*, may recover damages for the sake of example and by way of punishing the defendant." (Civil Code, § 3294; emphasis added.)

It would seem necessarily to follow that even though the trial court has determined that this is a proper case for an award of exemplary damages, and there appears no legal reason for redetermination of that question, it would be improper and premature to assess such damages until or concurrently with the assessment of "the actual damages". Until then there are no actual damages for the exemplary damages to be an "addition" to.

This does not mean that the amount of exemplary damages must be proportionate to the amount of actual damages assessed. In *Finney v. Lockhart*, 35 Cal.2d 161, 217 P. 2d 19, the Supreme Court affirmed an award of \$1 as actual damages and \$2,000 as exemplary damages; in *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282, \$1250 as general and special, \$4000 as exemplary damages. See also *Clark v. McClurg*, 215 Cal. 279, 9 P.2d 505, 81 A.L.R. 908; *Sterling Drug, Inc., v. Benatar*, 99 Cal.App.2d 393, 221 P.2d 965.

But in the absence of actual damages (in our case, until they are assessed) one of the bases for the assessment of exemplary damages is lacking. Significant is the statement in *Birch Ranch & Oil Co. v. Campbell*, 43 Cal.App.2d 624, at page 628, 111 P.2d 445, 447: "plaintiff has shown no actual damages, and exemplary damages, being mere incidents and not the basis of a cause of action, are not recoverable in the absence of a showing of actual damages."

The judgment, which is in the form of a money judgment only, must be reversed, but the findings of fact and conclusions of law insofar as they bear upon and determine the issue of liability are correct and amply supported by the evidence and the law, and will not be disturbed. The cause must be remanded for trial of the issue of damages and the assessment of actual and exemplary damages, if any.

It is, therefore, ordered that the judgment be reversed, with directions that the trial court revise the findings of fact and conclusions of law, and take such further steps and proceedings in the action as may be meet and proper, all in accordance with the views herein expressed. Each party will bear his own costs on this appeal.

PETERS, P. J., and BRAY, J., concur.



120 Cal.App.2d 653

GAGE v. KERN.
Civ. 4810.

District Court of Appeal, Fourth District,
California.
Oct. 16, 1953.

Action by caretaker on defendant's mountain ranch to recover compensation for his services wherein defendant cross-complained seeking damages for alleged injury to trees caused by cutting burls therefrom without putting on tree seal. The Superior Court, San Diego County, John A. Hewicker, J., entered order granting plaintiff's motion for nonsuit as to the cross-complaint, and entered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that the evidence as to damage was not sufficiently substantial to justify presentation of cross-complaint to jury.

Affirmed.
Cal. Rep. 261-262 P.2d—13

1. Master and Servant ☞66

In action by caretaker of defendant's mountain ranch to recover compensation for his services wherein defendant cross-complained seeking damages for injury to trees caused by cutting burls from the trees without putting tree seal on them, even if there had been some evidence of damage which would have required submission of cross-complaint to jury, evidence showed that defendant acquiesced in cutting of the burls, failed to take steps he knew were necessary to prevent injury, and by his own conduct waived any right to claim damages therefor.

2. Damages ☞208(1)

In action by caretaker of defendant's mountain ranch to recover compensation for his services wherein defendant cross-complained seeking damages for injury to trees caused by cutting burls from the trees without putting tree seal on them, evidence as to damage was not sufficiently substantial to justify presentation of cross-complaint to jury.

Ruel Liggett, Roy M. Cleator, E. C. Davis, San Diego, for appellant.

White & Condra, San Diego, for respondent.

BARNARD, Presiding Justice.

The plaintiff was employed as caretaker on the defendant's mountain ranch from December 16, 1948, to October 11, 1950. In February, 1951, he brought this action to recover compensation for his services. In the second count of a cross-complaint the defendant sought damages, alleging that the plaintiff had injured "various oak trees" by cutting, chopping and sawing them "in such a careless, wasteful, improper and destructive manner as to cause the said trees to be deformed and to become sick and, in most cases, to die." When the evidence was all in, and before arguments to the jury, the court granted the plaintiff's motion for a nonsuit as to this count. The jury returned a verdict in favor of the plaintiff upon the complaint and upon the first cause of action of the cross-complaint. A motion for a

new trial was denied, and the defendant has appealed from the judgment.

No attack is made on the judgment insofar as it relates to the complaint and the first cause of action of the cross-complaint. Appellant's sole contention is that the evidence, while indefinite and uncertain as to the extent and amount of damage, was sufficient to require the submission of that issue to the jury. It was and is claimed that the respondent injured some trees by cutting burls, without covering the wounds on the trees with paint, cement or some kind of tree seal. Apparently, these burls were cut in 1949, although the time is not clearly disclosed by the record. The appellant admits that he sold this ranch about a year after the cutting of the burls, and prior to the trial of the action; that nothing was said before the sale about the injured trees; and that he did not know whether the buyer noticed the damage, or whether he paid less for the property than he would otherwise have paid.

The appeal is taken upon a partial transcript containing certain testimony of the appellant, and of a witness named Lamb. Lamb testified that in May, 1952, he saw some trees on appellant's ranch; that he thought they were 75 or 100 years old; that some trees had rotted where burls or limbs had been cut and no tree seal applied; that where such a seal was not applied the weather would cause a tree to rot; and that such deterioration as he saw would come about in from three months to a year. The appellant testified that he went to the ranch one morning and saw the respondent with six or seven burls; that the respondent told him that he was cutting burls and selling them; that he asked respondent if this was not "a heck of a job"; that he did not look to see what trees the burls came from; that the next day he saw the respondent cutting a burl; that the respondent said to him "This might turn out to be pretty good. If it does, Kern, I'll cut you in on half of it"; and that "I passed it off then and thought no more of it at all." He further testified that in March, 1951, he noticed that some of the trees were dying; that he had

the ranch up for sale at that time; that the trees which were dying were the ones from which burls had been cut, and apparently the winter rains had started them to rot; that no attempt had been made to seal up the cuts; that he was familiar with cutting burls from trees and knew that sealing was necessary in order to prevent injury; that he did not object when he saw that the respondent was cutting burls from the trees and made no protest; that he did not put on tree seal or tell the respondent to do so; that he did not tell the respondent not to cut burls or make any protest until he filed his cross-complaint; that he saw indications within two or three months that the trees were being injured but did nothing about it; that he cut his asking price for the ranch from \$65,000 to \$45,000, and the injury to the trees was a contributing factor in this; that he figured the ranch was damaged in the amount of \$2,500 because probably 25 trees would die, and he figured the value of each tree would be at least \$100, and that he attributed the value of the ranch, in part, to the trees. When asked why he did not stop the respondent when he saw that he was cutting burls the appellant replied that the respondent "wanted exercise" and that "I figured if he was getting any money out of it, going ahead and cutting these burls off, and supposing he had sense enough to take care of the trees after he cut them off, I had no objection to him doing it." When asked if he had not acquiesced in the respondent cutting the burls, he replied "I just passed it off."

The evidence as to the number of burls cut by the respondent, the number of trees injured, and the extent of any possible damage is very unsatisfactory. The evidence does disclose that the value of the trees for wood or lumber was not considered by the appellant, and that he considered their value only as a part of the ranch. He had sold the farm long before he made any complaint and his evidence indicates that the then condition of the trees had nothing to do with the price he received. While he testified that he cut his asking price for the

PEOPLE v. LOTREAN.

Cr. 5024.

District Court of Appeal, Second District,
Division 1, California.

Oct. 8, 1953.

ranch and that the then condition of the trees was a contributing factor in this, there was no evidence that his original asking price was reasonable. No evidence was offered as to the value of the ranch before and after the alleged injury to the trees, and there is no satisfactory evidence of any material damage to the ranch as such.

[1] Assuming that there was some evidence of damage which would otherwise have required the submission of this issue to the jury, the evidence clearly shows that the appellant acquiesced in the cutting of these burls, failed to take steps he knew were necessary to prevent injury, and by his own conduct waived any right to claim damages therefor. No contention is or was made that the cutting of these burls, in itself, caused any injury to these trees. Injury is claimed in that, after the burls were cut, proper steps were not taken to prevent injury by weather. The appellant knew of the necessity for that, and failed to either take that precaution or tell the respondent about the necessity therefor. There is no evidence that the respondent knew that any such steps were necessary, and the injury claimed could have been prevented had the appellant taken the obvious steps that were open to him and known to him.

[2] Insofar as the record shows, the evidence is not sufficiently substantial to justify the presentation of this issue to the jury, and there is nothing in the record to indicate that the order complained of could have affected the result or that it resulted in prejudice to the appellant. The appellant further contends that if the granting of a nonsuit on this issue should be reversed, the entire judgment should be reversed so that all the issues could be tried together. Apparently, this discloses the real reason for this appeal. If the record required a reversal on that issue, no valid reason appears why the other issues which were determined by the jury, and again by the court, should be retried.

The judgment is affirmed.

GRIFFIN, J., concurs.

Defendant was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., of possession of narcotics, and he appealed. The District Court of Appeal, Drapeau, J., held that evidence of value of the narcotics found under control of defendant was admissible for purpose of determining truth or falsity of defendant's representation that box containing narcotics, a fact of which he was allegedly not aware, had been left with him by a friend for safe keeping.

Judgment affirmed.

1. Criminal Law ⇨829(3)

In prosecution for possession of narcotics, refusal of instruction that in order for defendant to have in his possession the objects charged in information, jury must be convinced by evidence, and beyond reasonable doubt, that he knowingly had such objects in his possession, was not error, when instruction given by court on matter of possession fully informed jury as to necessary element of knowledge on part of defendant. Health and Safety Code, § 11500.

2. Criminal Law ⇨338(6)

In prosecution for possession of narcotics, wherein defendant denied knowledge of contents of box containing narcotics, and stated that he was merely keeping the box for a friend, evidence of value of the narcotics was properly admitted as material for consideration of jury in determining truth of defendant's testimony that he was merely keeping box, containing valuable narcotics, for a friend. Health and Safety Code, § 11500.

Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was convicted by a jury of eight counts of possession of narcotics, in violation of Section 11500 of the Health and Safety Code. The jury also found that defendant had suffered imprisonment for conviction of two prior felonies.

Two grounds of appeal are urged: (1) That it was error for the trial court to refuse an instruction offered by defendant; and, (2) that it was error to admit testimony as to the value of the narcotics found in defendant's motel room. These will be discussed in order.

[1] The instruction offered and refused reads as follows:

"In order for defendant to have in his possession the objects charged in the information, you must be convinced by the evidence and beyond a reasonable doubt that he knowingly had such objects in his possession. The meaning of the word 'possession' includes the exercise of dominion and control over the thing possessed."

The court gave the following instruction:

"Within the meaning of the law, a person is in possession of a narcotic when it is under his dominion and control, and, to his knowledge, either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him. To constitute possession it is not necessary that the person be the owner of the narcotic in question."

Defendant relies upon *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433. In that case our Supreme Court states the rule that knowledge in relation to a defendant's awareness of the presence of narcotics is a basic element of the offense of possession. And in that case a conviction for possession of marijuana was reversed because the trial court withdrew from the jury an instruction that to sustain a conviction the accused should have been aware of his possession of the proscribed narcotic. The instruction withdrawn in that case was the same as the instruction offered and refused in this case.

But in this case the instruction which was given, as quoted above, contains the neces-

sary element of knowledge required by the *Gory* case.

[2] We turn now to defendant's assertion of error as to the admission of evidence. This requires a brief statement of the facts.

Two sheriff's officers were waiting for defendant when he returned to his motel room about nine o'clock one evening. They arrested him at the door and went inside with him. They searched the room and found in a closet a metal tool box. A key on a key ring taken from defendant fitted the lock on the box. Unlocking and opening the box, the officers found eight bottles of eight different kinds of narcotics, dilaudid, pantopon, morphine, codeine, opium, demerol, cocaine and dionin.

Defendant denied that he had ever touched any of the bottles, but his fingerprint was found on one of them. He admitted that he knew narcotics were in the bottles, but he said he was keeping the box for a friend. He would not give the name or address of this person. He said he knew the bottles contained narcotics because out of curiosity he had previously looked inside the box. In answer to further questioning he said, "You have got me. I am dead. What is there to say."

Defendant on the trial testified in his own behalf and said that he was keeping the box for a friend, and that he had no knowledge of its contents until the officers opened it in his presence; that he thought it contained only tools until then.

The district attorney presented evidence in rebuttal that the narcotics in the box were worth \$2,500.

This evidence was material for the consideration of the jury, in performing their duty to determine the truth of defendant's testimony; whether it was likely that any one would leave narcotics of that value with a casual acquaintance. The test of materiality of the people's evidence in a criminal case is whether it tends logically, naturally, or by reasonable inference to establish any fact necessary to the prosecution's case or to overcome any fact asserted as a defense. Authorities to the effect that the value of narcotics has no bearing upon the fact of possession are not pertinent here.

Defendant had a fair and impartial trial. Indeed, the trial judge tempered justice with mercy when he ordered concurrent rather than consecutive sentences on the eight counts of which defendant stands convicted.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.



120 Cal.App.2d 571

GATES v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N et al.

BANK OF AMERICA NAT. TRUST & SAV. ASS'N v. HALL et al.

Civ. 19334, 19335.

District Court of Appeal, Second District,
Division 2, California.

Oct. 7, 1953.

Action was brought against bank to recover on claim arising from result of allegedly unauthorized payment by bank of drafts drawn on depositors, and the bank filed a counterclaim seeking recovery on certain notes and also filed action to recover on the notes. The cases were consolidated for trial. The Superior Court of Los Angeles County, James G. Whyte, J., entered judgment adverse to bank, and bank appealed. The District Court of Appeal, Fox, J., held that evidence supported determination of Superior Court that bank failed to sustain burden on it to establish that there had been a ratification by depositors of allegedly unauthorized payment by bank of drafts.

Judgment affirmed.

1. Pleading ⚡36(1)

A party may not make a contention based on a statement of fact contrary to admission in his own pleading.

2. Pleading ⚡36(3)

Where bank alleged in its answer, in action against it to recover on claim arising from result of alleged unauthorized payment by bank of drafts drawn on depositor,

that depositor claimed that payment of drafts was unauthorized and demanded reinstatement in account of amount so charged, bank could not contend that depositor ratified payment of drafts.

3. Principal and Agent ⚡169(1)

For purposes of ratification by principal of unauthorized act of agent, there must be confirmatory conduct, or at least conduct inconsistent with disapproval.

4. Principal and Agent ⚡169(1)

For purposes of ratification by principal of unauthorized act of agent, facts are not to be stretched, or ambiguous, inconclusive or independent acts made the basis of a ratification.

5. Principal and Agent ⚡173(1)

Where ratification by principal of unauthorized act of agent is to be inferred from principal's conduct, ratification is not a fact to be assumed but is a matter of defense, and burden of proof rests on one alleging ratification.

6. Banks and Banking ⚡154(8)

In action against bank to recover on claim arising from result of allegedly unauthorized payment by bank of drafts drawn on depositor, evidence supported trial court's determination that bank failed to sustain burden of proving that depositor had ratified allegedly unauthorized payment of drafts.

7. Principal and Agent ⚡75, 170(3)

Where rights of third persons depend on election of principal either to ratify or refuse to ratify unauthorized act of agent, principal must disaffirm unauthorized act of agent within reasonable time after acquiring knowledge thereof, or else his silence may be deemed ratification or acquiescence, in order to protect an unsuspecting third party, but reasons for such rule do not apply with equal force in favor of agent who has committed an unauthorized act.

8. Principal and Agent ⚡75

Where rights and obligations of third parties are not involved, and controversy relates solely to whether principal has exonerated admittedly unauthorized act of agent by ratification implied from conduct, such intention to confirm should rest on unequivocal evidence, and must be manifested

by acts inconsistent with any other hypothesis.

Samuel B. Stewart, Jr., San Francisco, Hugo A. Steinmeyer, and Geo. L. Beckwith, Los Angeles, for appellant.

Joseph Henry Wolf and William Herbert Hall, Los Angeles, for respondents.

FOX, Justice.

The two cases here involved were consolidated for trial by stipulation. In case No. 19334, Charles Gates, as assignee for purposes of suit and collection of William H. Hall, his wife Doris G. Hall, and Bess L. Gates, brought an action against defendant (hereinafter called the bank) for the recovery of \$2,552.63.* The claim arose as the result of the payment by the bank of ten drafts drawn on William H. Hall, which were charged by the bank to the account of plaintiff's assignors. The bank's answer admitted charging plaintiff's assignors' checking account the sum of \$2,552.63, covering the amounts represented by the bank drafts, but denied that it cashed the drafts without authorization. By way of affirmative defense, the bank pleaded that after charging the amount of the drafts to plaintiff's assignors' account, "plaintiff's assignors made claim to the said bank that said charges to said account were unauthorized and demanded reinstatement in their account of the amount so charged; defendant denies (sic) such claim and asserted the drafts referred to in the complaint were drawn by the authority of the plaintiff's assignors * * * [and] were properly charged to their account. Thereupon plaintiff's assignors agreed with the defendant bank that they would accept such charges; that the defendant bank did lend to plaintiff's assignors, William Herbert Hall and Doris Gates Hall, the sum of \$2,500.00; * * * and plaintiff's assignors released all their claim and demand against the defendant bank with respect to the latter alleged in the complaint." In another separate defense, the bank asked for judgment on two \$1,000 notes executed to it by Mr. and Mrs. Hall.

Case No. 19335 was an action by the bank against Mr. and Mrs. Hall on two promissory notes, each in the amount of \$1,000. In this action the Halls set up as a counterclaim the same claim sued on by Charles Gates in Case No. 19334.

The testimony showed that on or about December 30, 1946, Mr. and Mrs. Hall and Bess L. Gates opened a commercial account at the Sunset-Clark branch of the bank. The funds in this account could be withdrawn only upon the signature or authority of any one of the depositors. During the month of February, 1947, the bank received through clearings ten drafts drawn by one A. B. Steuer on Mr. Hall and addressed to Hall at the Sunset-Clark branch. These drafts were paid by the bank, which concedes that Mr. Steuer was not authorized to sign on the Halls' account.

Prior to the payment of the ten drafts here in issue, Mr. Hall had instructed Mr. Steuer to draw drafts on him at the Sunset-Clark branch. In several instances where this was done previous to February, 1947, the bank, upon receiving such drafts, made payments thereunder after notifying Mr. Hall and receiving either his authorization to honor the draft or a check covering the amount. This procedure was not followed with respect to the ten drafts received by the bank in February, 1947, which were paid and charged to the Halls' account without consulting any of the depositors. The bank had no written authority to cash drafts on Hall drawn by Steuer. Mr. Sheehy, assistant cashier of the Sunset-Clark branch, had requested such authorization, but none was ever furnished.

Mr. Hall testified that shortly after the bank paid the drafts he learned of the payments by way of a telephonic call from "some girl" at the bank regarding a check for \$300.00 which he had drawn on his account, which could not be honored because there was less than \$100 in the account. He thereupon remonstrated that the situation was "ridiculous" inasmuch as the account contained "close to \$3,000.00." Upon discovering that the drafts had been charged to the account, Mr. Hall visited the

* These actions were filed prior to the amendment increasing the jurisdiction of the Municipal Court to \$3,000.

bank, on or about March 5, 1947, at which time he negotiated a loan of \$2,500.00, executing therefor a promissory note to the bank in that amount. He testified this money was deposited in his account to replenish it in the approximate amount of the drafts, and that he had demanded that the bank reimburse him for the amount of these drafts charged to his account. Mr. Hall denied that he would have authorized the bank to pay any of the drafts if the bank had communicated with him in advance with reference to their acceptance.

On April 4, 1947, Mr. Hall paid the \$2,500 due on the note. Early in May, 1947, he and Mrs. Hall obtained a loan of \$1,000 from the bank, evidenced by a promissory note executed by them. On about May 28, 1947, they secured another \$1,000 loan in exchange for their promissory note. The sums realized on both these loans were deposited to their account with the bank, and have not been repaid. These notes are the basis for the bank's counterclaim as well as for its separate action in case No. 19335.

The trial court gave judgment for plaintiff Charles Gates in the sum of \$2,552.63, plus interest, against which the bank was given an offset of \$2,000, plus interest and attorney's fees, on the two unpaid notes. The judgment was grounded on the court's finding that none of the payments made by the bank on the ten drafts and charged to the Hall account were authorized or approved, and that such payments had not been subsequently ratified.

[1,2] Granting that it exceeded its authority in paying the drafts prior to express authorization, the bank contends upon this appeal that the evidence, as a matter of law, establishes that its payment of the drafts was ratified by the acts and conduct of Mr. Hall. This argument is not supported by the record. In its brief, the bank urges that "there is no evidence in the record that at the time Mr. Hall executed the note for \$2,500 * * * at which time he had full knowledge the drafts had been paid, he made any objections to the payment of the drafts, or that he repudiated the payment, or that he requested the Bank to recredit the account with the amount of the drafts and that the Bank refused." However, Mr.

Hall testified upon direct examination that he demanded that the bank repay him the sum total of the ten drafts it had cashed without his authorization. Furthermore, in its own answer by way of affirmative defense, the bank alleged that "plaintiff's assignors made claim to the said bank that the said charges to said account were unauthorized and demanded reinstatement in their account of the amount so charged * * *." A party may not make a contention based on a statement of fact contrary to the admission in his own pleading. *Bloss v. Rahilly*, 16 Cal.2d 70, 77, 104 P.2d 1049; *Rhode v. Bartholomew*, 94 Cal.App. 2d 272, 278-279, 210 P.2d 768. Although the bank also alleged that upon its denial of the claim that its payments were unauthorized the Halls "agreed with the * * * bank that they would accept such charges," the evidence and the inferences therefrom merely give rise to a question of fact as to whether there was ratification by acquiescence or a repudiation, which the court resolved against the bank. *Rhee v. L. K. Small Co.*, 83 Cal.App. 339, 344, 256 P. 839; *Hooker v. American Indemnity Co.*, 12 Cal. App.2d 116, 123, 54 P.2d 1128.

[3-6] The bank contends, upon the sound authority of *Ralphs v. Hensler*, 97 Cal. 296, 32 P. 243, 245, and similar cases, that it is not essential that it be shown that there was express ratification of an unauthorized transaction, since ratification "is implied whenever the acts and conduct of the principal, having full knowledge of the facts, are inconsistent with any other supposition than that of * * * an intention to abide by the act though it was unauthorized." The bank's position is that the acts and conduct of Mr. Hall, after learning of the payments, and of his executing a promissory note to the bank and repaying it, are inconsistent with any other premise than that of his intention of confirming the bank's act. However, "for purposes of ratification there must be 'confirmatory conduct, or at least conduct inconsistent with disapproval. Facts are not to be stretched, or ambiguous, inconclusive or independent acts made the basis of a ratification.'" *Schomaker v. Petersen*, 103 Cal.App. 558, 569, 285 P. 342, 347. "The

evidence shows Mr. Hall objected to the withdrawals made from his account. The fact that he borrowed from the bank in order to restore his account to its previous balance, and his subsequent repayment of that loan, is far from lending itself to the single, inexorable interpretation that he intended thereby to sanction the bank's action. In the course of commercial transactions numerous instances may be found of disputes between parties, regarding a particular item, which do not preclude the conduct of further business relations while the settlement of the contested matter remains in abeyance. It cannot be said that Mr. Hall's actions were consistent only with approval of the bank's unauthorized act. Ratification inferred from conduct is not a fact to be assumed but is a matter of defense, "and the burden of proof rests upon the one who alleges it." *Rhee v. L. K. Small Co.*, 83 Cal.App. 339, 344, 256 P. 839, 840. The record fully supports the trial court's determination that the bank failed to sustain this burden. *California Bank v. Sayre*, 85 Cal. 102, 24 P. 713. As was said in *Bank of America Nat. Trust & Savings Ass'n v. Perry*, 41 Cal.App.2d 133, 136, 106 P.2d 53, 54, in which the court found no ratification had occurred: "The evidence, which was largely uncontradicted, is capable of two interpretations, each equally reasonable. Findings in favor of either party would find ample support in the record. Under such circumstances, the case is one resting entirely and peculiarly within the discretion of the trial court."

[7] It is deserving of special mention that in the cases cited by the bank where ratification was implied, the rights of some innocent third party who had dealt with the purported agent were involved. There is no question but that where the rights of third persons depend on his election, the rule is a principal must disaffirm an unauthorized act of his agent within a reasonable time after acquiring knowledge thereof, else his silence may be deemed ratification or acquiescence in order to protect an unsuspecting third party. *Triggs v. Jones*, 46 Minn. 277, 48 N.W. 1113, 1115; *Pacific Vinegar & Pickle Works v. Smith*, 152 Cal. 507, 511, 93 P. 85. In *Triggs v. Jones*, su-

pra, 48 N.W. 1115-1116, it is stated that the reasons for such a rule do not apply with equal force in favor of the agent who has committed an unauthorized act. "Consequently mere passive inaction or silence, which would amount to an implied ratification in favor of third parties, might not amount to that in favor of the agent * * *." This same proposition is given elaborate expression by our Supreme Court in the case of *Pacific Vinegar & Pickle Works v. Smith*, supra, 152 Cal. 511, 512, 93 P. 86: "But, upon a moment's reflection, it will become apparent that the reason for applying the rule in all its liberality to innocent third persons does not exist in the same broad and benignant sense to the unwarranted * * * act of the agent. * * * It is limited, so far as the agent is concerned, to those cases where there remains with the principal, after his first complete knowledge of the transaction, the power to rescind, and failing, so to do, he is properly charged with full acceptance of all the responsibilities of the contract, even to the exoneration of his agent, because, with the ability to rescind, if he had rescinded, the transaction would be at an end and nobody would be injured."

[8] In harmony with these principles, it appears clear that where the rights and obligations of third parties are not involved, and the controversy relates solely to whether a principal has exonerated the admittedly unauthorized act of his agent by ratification implied from conduct, such intention to confirm should rest on unequivocal evidence, and must be manifested by acts inconsistent with any other hypothesis. *Schomaker v. Petersen*, 103 Cal.App. 558, 569, 285 P. 342. It is thus clear that nothing in Mr. Hall's statements or conduct required the court, as a matter of law, to find that he had impliedly ratified the bank's admittedly unauthorized acts in charging the drafts to his account.

The judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, J., deeming himself disqualified, does not participate herein.

120 Cal.App.2d 588

CAMPBELL v. JUNG et al.

Civ. 15645.

District Court of Appeal, First District,
Division 2, California.

Oct. 9, 1953.

Rehearing Denied Nov. 6, 1953.

Action by builder to foreclose mechanic's lien on owners' buildings. The Superior Court, County of Marin, Thomas F. Keating, J., entered judgment for builder and owners appealed. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to justify finding which absolved builder from fault for any overlap of owners' building or at least to justify finding that owners were estopped from asserting liability of builder because of owners' failure to object to location of building.

Affirmed.

Mechanics' Liens ⇨281(1)

In builder's action to foreclose mechanic's lien, evidence was sufficient to justify finding which absolved builder from fault for any overlap of owners' building or at least to justify finding that owners were estopped from asserting liability of builder because of owners' failure to object to location of building.

Henry J. Kleefisch, Reed M. Clarke, San Francisco, for appellants.

Barrett & Harkleroad, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action to foreclose a mechanic's lien for a balance of \$6,477.89 allegedly due plaintiff, a general contractor, for the building on a cost plus basis of a store building and another small building on a lot owned by defendants at Fairfax, California. The court gave plaintiff judgment for \$6,214.84, costs and foreclosure of lien and defendants appeal. They complain that the rejection of their contentions below, that they were overcharged (that not all amounts charged went into or were reasonably chargeable to the construction

of the building), that the rear part of the store as built extended into an adjoining lot not owned by them and that the walls of the store did not form right angles, is not supported by the evidence. They do not sufficiently comply with the rule that an appellant who complains of insufficient evidentiary support must point out the evidence involved and wherein it is insufficient, *Sutro Heights Land Co. v. Merced Irr. Dist.*, 211 Cal. 670, 687, 296 P. 1088; *Metzenbaum v. Metzenbaum*, 96 Cal.App.2d 197, 199, 214 P.2d 603, but as the evidence is not very extensive we shall nevertheless review it in so far as appellants' grievance relates to specific points.

The question of the alleged overcharging was originally excluded from the trial before the court as it was to be assigned to a referee. As to the other points it was conceded that the contract as to the construction of the store contained the provision: "It is understood that property lines and proper location of the building will be the responsibility of the owner." Moreover the evidence showed without conflict that defendants, when the building was started, were in possession of several conflicting survey maps, which they did not show to plaintiff or his personnel notwithstanding a request for maps, and that defendant Harry Fong told them that an existing adjacent building overlapped somewhat on his premises, but that he wished the sidewall of his new building to be built (gunnited) against the sidewall of the neighbor, whose permission for such gunniting he said he had obtained. Harry Fong testified that he had also given directions to build the sidewall at right angles to the sidewalk line and also to line the sidewall from a survey stake at the back end of the lot indicating the property line with the adjacent property. There was surveyor's evidence that the existing wall against which the new sidewall was to be gunnited did not follow the property line but to the rear deviated into the neighbor's premises, and that the front angle of defendants' lot at the side of said neighbor's building was not 90 degrees but somewhat less than 89 degrees. Therefore both the direction to build against the existing wall

of the neighbor and to build at a 90 degree angle to the sidewalk would cause defendants' wall to overlap on the adjacent premises. The evidence of plaintiff and his personnel was that the only direction received was to gunnite the sidewall against the existing sidewall of the adjacent building, that this was done; that the gunnited wall, which because of the greater depth planned for the new building had to extend to the rear beyond the adjacent sidewall, was there extended in the same general direction as given to the front part by the existing wall so that the inside of the new sidewall would be straight; that no rear stake was shown to or found by them when the building was started, that only when the store was completed a rear stake was dug up; that the foundation was laid approximately where the border wire fence had been and that a line was run from the rear corner post of that fence to the front. It was further undisputed that defendant Harry Fong had been on the work every day, had seen what was being done and had not objected, and that he had paid three invoices for work done amounting to more than \$10,000 without objection as to the location and further that the adjacent owner, although informed of the overlap, had not until the trial made any claims. Considering the contract provision making the location and property lines defendants' responsibility and the evidence stated, the court was justified in absolving plaintiff from responsibility for any overlap as attributable to defendants' faulty directions, or at any rate in considering defendants estopped from asserting any responsibility of plaintiff in this respect, *Giberson v. Fink*, 28 Cal.App. 25, 34, 151 P. 371. The rejection of defendants' contention that the walls of the store building were not at right angles is completely supported by evidence of the surveyor Voorhies that the corners of said building had angles of 90 degrees.

When, after the reference as to the overcharging, the trial before the court was reopened, the attorney of defendants declared in substance that bills and vouchers had been furnished and that many items were "O. K.", no longer in dispute. The

items still in dispute were enumerated, and it was decided that evidence as to these items would be taken before the court. The plaintiff then offered evidence with respect to these items one by one. After the conclusion of this evidence appellants offered evidence and calculations of the expert witness Tieslau as to what reasonably should have gone into the buildings and what they should have cost. Plaintiff objected because such evidence was out of line with the earlier admittance that many items, among which all materials furnished, were no longer in dispute. However the court permitted the evidence to go in. Plaintiff then recalled the witness Yates, his general superintendent, who testified that all charges for material and all payroll charges made by plaintiff were reasonable, thus causing a conflict with Mr. Tieslau's evidence.

The decision of the court that \$6,214.84 was still due was, according to a short memorandum opinion of the trial judge, arrived at by subtracting from the total amount claimed those enumerated amounts in dispute which he considered properly disputed, totalling \$406.60, and adding an amount of \$143.55 mistakenly omitted and proved at the trial without objection.

Appellants, contending that the decision as to the amount overcharged is not supported by the evidence, cite no other evidence than that of their witness Tieslau that the reasonable price of the construction would amount to approximately \$10,500 and further urge only that too much supervisory personnel was used. We need not decide whether the evidence of the witness Tieslau as to the reasonable costs of construction had any relevancy although it did not take into consideration the charges which were no longer disputed by defendants, because the court by implication preferred to accept the testimony of the witness Yates that, with a few specified exceptions, the charges made were reasonable.

With respect to the supervision the court by implication accepted the testimony of the same witness that the hours of those who did the supervising and expediting work did not duplicate, but that in a large

organization working on different jobs at the same time, supervising personnel must sometimes substitute for each other. The evidentiary support as to other items, not specifically mentioned, can evidently not be reviewed.

Judgment affirmed.

GOODELL, J., concurs.



120 Cal.App.2d 625

MARTIN et al. v. BARRETT et al.

Civ. 4803.

District Court of Appeal.
Fourth District. California.

Oct. 15, 1953.

Action against parents of twelve year old boy for injury to five year old plaintiff as result of being struck in eye by pellet from air rifle discharged by boy. The Superior Court of San Diego County, L. N. Turrentine, J., dismissed complaint after plaintiffs refusal to amend after sustaining of demurrer, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that in order to state a cause of action against parent for tort of a minor child, complaint must fully set forth what participation there was by parent in negligent act of the child and the failure of the parent to act in reference thereto.

Judgment affirmed.

1. Parent and Child ☞13(1)

As a general rule, there is no vicarious liability on part of a parent for the tort of a child, but the parent may be held liable if he has knowledge of the child's previous conduct of the same character, his disposition to do the act charged, and if the parent has failed to warn concerning such propensity.

2. Weapons ☞18(2)

Complaint against parents of boy 12 years of age who discharged an air rifle in

his yard, causing injury to eye of 5 year old child, was insufficient to state a cause of action against father of boy in absence of allegation that father knew that boy and other children were in the yard at time of accident, or that he ever knew boy had used rifle previously in a careless manner, since father's liability could not be predicated upon boy's bare possession of air rifle, coupled with certain isolated alleged negligent acts on part of boy in using it.

3. Weapons ☞18(2)

Complaint against parents of 12 year old boy who discharged air rifle in such manner that pellet struck eye of 5 year old plaintiff was insufficient to state cause of action against mother of boy in absence of allegation of previous wrongful act by boy in using the air rifle, or any prior knowledge by mother that boy had previously in any manner improperly used the rifle.

4. Parent and Child ☞13(2)

Before a cause of action may be stated against the parents for the tort of a child, complaint must allege a specific known course of conduct by minor involving his habitual, intentional, and specific wrongful acts against others and parents' failure to take proper precautions to guard them against such acts.

Robert W. Conyers, of Daview, Burch & Conyers, San Diego, for appellants.

Eugene A. Horton, San Diego, for respondents.

GRIFFIN, Justice.

Plaintiff Glenn Eugene Martin, individually and as guardian of Billy Frank Martin, a minor, five years of age, brought this action against George Barrett and his wife and their minor child, Lawrence, 12 years of age, alleging that the defendants owned a two-apartment dwelling house; that plaintiffs rented the upstairs apartment and defendants lived downstairs. Both shared the common back yard.

The charge is that defendant Lawrence Barrett "was at all times mentioned herein a careless, unreasonable, aggressive and reckless person, and had teased, molested

and bullied plaintiff Billy and his brother"; that Lawrence was immature and lacked the judgment to be trusted with the use or possession of any gun without the close attendance and supervision of an adult person; that defendants George Barrett and Catherine Barrett, knowing all of these facts, negligently allowed and permitted said Lawrence Barrett to have possession of an air rifle in good working order; that on May 30, 1952, Catherine Barrett negligently permitted the defendant Lawrence Barrett to use said air rifle, together with the leaden shot therefor, on the porch of the Barrett apartment, and negligently permitted said Lawrence Barrett to shoot the air rifle from said porch into said back yard; and that defendant Catherine Barrett knew that Billy was then playing in said back yard with his seven-year-old brother; that one of the leaden bullets struck plaintiff Billy in the eye and destroyed the sight of it; that the injury sustained was proximately caused by the carelessness and negligence of these defendants. Judgment is sought in the sum of \$23,000 damages.

Defendants George and Catherine Barrett's demurrer was sustained and plaintiffs were given ten days in which to amend. They refused to amend and judgment of dismissal followed.

The only question presented on this appeal is the sufficiency of the complaint to state a cause of action against the defendant parents.

Defendants rely principally upon Hagerty v. Powers, 66 Cal. 368, 5 P. 622, which holds in effect that a father is not liable in damages for the torts of his minor child committed without his knowledge, consent or sanction and not in the course of his employment of the child. There it was alleged that the father "willfully, carelessly, and negligently suffered, permitted, countenanced, and allowed" his son of 11 years of age, to have in his possession a loaded pistol, which pistol the boy afterwards so carelessly used and handled as to shoot the infant child of the plaintiff. It was there held that no cause of action was stated against the father.

In Figone v. Guisti, 43 Cal.App. 606, 185 P. 694, also cited by defendants, it was held

that a father is not liable for the tort of his minor son because he negligently placed him within reach of a loaded revolver which the son used to the injury of another, and that no liability arises merely by reason of the relationship of father and son.

It is plaintiffs' position that the case of Ellis v. D'Angelo, 116 Cal.App.2d 310, 253 P.2d 675, 679, analyzing the parental liability, has greatly narrowed the interpretation of those cases. There, where a baby sitter was violently attacked by the parents' four-year-old boy, it was held that a parent will incur liability for his minor child's intentional acts of violence or damage to persons or property if, knowing of the child's vicious or destructive tendencies or acts, he fails to exercise reasonable measures to restrain or discipline the child and thus encourages or acquiesces in such misconduct on the part of the child. The complaint in that action charged that the son "*habitually* engaged in violently attacking and throwing himself forcibly and violently against other people, and violently shoving and knocking them, all of which said defendant parents knew" and that said "parents negligently and carelessly failed to warn plaintiff of said child's said traits and disposition and negligently and carelessly failed to inform plaintiff that said child *habitually* indulged in such violent and furious attacks on others". (Italics ours.) In support of that holding Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42; Rocca v. Steinmetz, 61 Cal.App. 102, 214 P. 257, and other authorities are cited.

In Johnson v. Glidden, 11 S.D. 237, 76 N.W. 933, 74 Am.St.Rep. 795, parents were held liable where, with knowledge that their son was using it negligently, they permitted him to continue in possession of an air gun. The gravamen of the complaint in cases upholding liability is the knowledge of the boy's previous conduct, disposition to do the act charged, and the failure of the parents to warn the plaintiff of this propensity. See cases collected in Ellis v. D'Angelo, *supra*, 116 Cal.App.2d at page 317, 253 P.2d at page 679.

[1] It is the rule in California, as it is generally at common law, that there is no

vicarious liability on the part of a parent for the tort of a child. However, certain exceptions to this general rule exist, as stated in *Ellis v. D'Angelo*, supra.

It becomes apparent, therefore, that to state a cause of action against the parents for the tort of a minor child the complaint must fully set forth what participation there was by the parent in the negligent act of the child and the failure of the parent to act in reference thereto.

[2] As to the defendant George Barrett, the father, there is no allegation that he knew plaintiff Billy Martin and other children were in the yard, where the son used the gun, or when he used it, at the time of the accident involved, or that he ever knew he had used it before in a careless manner nor that he on that occasion permitted his son to obtain the gun to shoot it in the yard, injuring plaintiff. No habitual, intentional, or specific causes of misconduct are alleged. In other words, the father's liability is based upon the son's bare possession of an air gun, coupled with a certain isolated alleged negligent act on the part of the son using it, and it is specifically alleged that, at the time, the minor was under the immediate control and attendance of the mother. It is apparent that no cause of action was stated against the father. *Hudson v. Von Hamm*, 85 Cal.App. 323, 259 P. 374; *Weber v. Pinyan*, 9 Cal.2d 226, 235, 70 P.2d 183, 112 A.L.R. 407.

[3] As to the mother, there is the additional allegation that she knew Billy Martin and his brother were in the back yard when she permitted her son to shoot his air gun from the back porch into the yard, injuring plaintiff. Again, there is no previous wrongful act by the son in using the gun alleged, or any prior knowledge by the mother that the son had previously in any manner improperly used the gun.

[4] It does not appear that the *D'Angelo* case has overruled the *Hagerty* case, and before a cause of action may be stated against the parents for the tort of a child it must allege a specific known course of misconduct by the minor involving his habitual, intentional, and specific wrongful acts against other parties and the parents' fail-

ure to take proper precaution to guard them against said acts. The plaintiffs in the instant case failed to allege sufficient participation by either parent on the part of the child to state a cause of action against them.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



120 Cal.App.2d 537

KATEMIS et al. v. WESTERLIND.

Civ. 19721.

District Court of Appeal, Second District,
Division 2, California.

Oct. 2, 1953.

Action for specific performance of and damages for breach of a contract for sale of realty by defendant to plaintiffs. From a judgment of nonsuit by the Superior Court of Los Angeles County, plaintiffs appealed. The District Court of Appeal, Fox, J., held that arrival of a cashier's check for the balance due on the purchase price at a bank named as escrow holder on the Monday after a Saturday fixed as the time for payment thereof by the escrow instructions did not defeat the purchasers' right to specific performance of the contract, in absence of any language in such instructions clearly manifesting an intent to make time of the essence of the contract.

Judgment reversed.

1. Specific Performance ⇐123

In action for specific performance of contract for sale of realty to plaintiffs, oral and documentary evidence established plaintiff's prima facie right to such relief, so that judgment of nonsuit was erroneous.

2. Contracts ⇐164

A series of documents through which agreement is expressed must be construed collectively in ascertaining parties' whole contract. Civ.Code, § 1642.

3. Escrows Ⓒ5

Escrow instructions, which are merely customary and conventional means of consummating underlying executory contract for sale of realty, do not supplant such contract, but merely serve to carry it into effect.

4. Vendor and Purchaser Ⓒ50

Where terms of executory agreement for sale of realty are clarified and elucidated by provisions in escrow instructions, both instruments must be considered together in ascertaining contracting parties' total understanding and fixing their correlative rights and obligations.

5. Appeal and Error Ⓒ927(3)

An appellate court, in reviewing judgment of nonsuit, must construe evidence most strongly against defendant and indulge in every inference and presumption fairly arising from evidence in plaintiff's favor.

6. Specific Performance Ⓒ93

Arrival of cashier's check for balance due on purchase price of realty at bank named as escrow holder on Monday after Saturday fixed in escrow instructions as time for such payment did not defeat purchasers' right to specific performance of sale contract in absence of any language in such instructions clearly manifesting intent to make time of essence of contract.

7. Contracts Ⓒ211

The prescribing of day at or before which, or period within which, an act required by contract must be done, does not render time essential respecting such act, even if contract stipulates that it shall be done at or before day named.

8. Contracts Ⓒ211

Generally, in equity, time is not of essence of contract unless made so by express terms or necessarily so from nature of contract.

9. Contracts Ⓒ211

Intent to make particular date or time of essence of contract must be clearly, unequivocally and unmistakably shown by express declaration to render time essential, and mention of time during or before

which something shall be done is insufficient.

10. Specific Performance Ⓒ99

Valuable contractual rights should not be surrendered or forfeitures suffered because of slight delay in performance of contract, unless such intention clearly appears from contract or specific enforcement thereof will work injustice after delayed tender of performance.

11. Vendor and Purchaser Ⓒ78

A provision in real estate purchasers' escrow instructions, agreed to by vendor, that if conditions of sale contract were not complied with at time provided therein, escrow holder might nevertheless complete escrow as soon as such conditions, except as to time, were fulfilled, did not clearly, unequivocally and unmistakably show intent to make time of essence of contract.

12. Vendor and Purchaser Ⓒ78

A provision in vendor's agent's receipt for down payment on purchase price of realty that time for any act required by sale contract to be done might be extended no longer than 30 days by such agent precluded vendor from asserting that purchasers' payment of balance due before date specified in contract was of essence of contract.

13. Vendor and Purchaser Ⓒ78

The theory on which courts hold that time for performance of real estate sale contract by purchaser is of essence thereof is that damage to vendor because of purchaser's delay in performance cannot be estimated or compensated.

14. Evidence Ⓒ20(1)

It is matter of common understanding that purpose of provision in real estate sale contract that "time is of the essence of this contract" is to protect vendor against delays in payment of purchase price and tying up of his estate beyond fixed period without payment of agreed compensation therefor.

15. Specific Performance Ⓒ99

Real estate purchasers' default, if any, in failing to pay balance due on purchase price to bank as escrow holder by cashier's

check, enclosed in registered air mail letter posted on Friday before Saturday fixed in sale contract as time for such payment, until delivery of letter to bank on following Monday because it was closed on Saturday and Sunday, was at most a technical and unintentional default, which did not defeat purchasers' right to specific performance of contract by vendor, where time was not of essence of contract. Civ.Code, § 3392.

16. Vendor and Purchaser ⇨93

Vendor's cancellation of contract for sale of realty because of purchasers' failure to deposit balance due on purchase price with bank as escrow holder on date specified in contract after purchasers' full performance of contract by payment of such balance to bank two days later was unwarranted, in absence of intervening change in circumstances rendering enforcement of contract inequitable, where time for performance thereof by purchasers was not of essence of contract.

17. Escrows ⇨6

Provisions of escrow instructions for real estate purchasers' deposit with escrow holder of balance due on purchase price, and vendor's deposit in escrow of all instruments necessary for her to comply with such instructions, before specified date, were concurrent conditions, that is, mutually dependent, each promise being given in consideration for the other and each being due at same time. Civ.Code, § 1437.

18. Contracts ⇨225

Promises for agreed exchange are concurrently conditional, unless contrary intention is clearly manifested, if they can be simultaneously performed where same time or period of time is fixed for performance of each promise by terms thereof.

19. Vendor and Purchaser ⇨145, 168

Where contract for sale of realty calls for concurrent performance of parties' promises, neither party can place the other in default, unless party claiming default is fully able to perform or tender performance of his promise.

20. Contracts ⇨278(1)

A party to contract cannot require other party thereto to perform his part of

agreement, unless party demanding such performance has fulfilled all conditions precedent imposed on him and is able to and has offered to fulfill all conditions concurrent imposed on him.

21. Vendor and Purchaser ⇨148, 170

Where both parties to real estate sale contract, making time of essence thereof, allow date for final payment of purchase price to pass without action, neither party can be subsequently placed in default without tender of performance by other party.

22. Specific Performance ⇨99

Vendor and Purchaser ⇨93

Where vendor of realty delivered into escrow a termite report, required by sale contract, at the same time that purchasers deposited with escrow holder full amount of balance due on purchase price, after time fixed by contract for performance of such acts, contract was in full force and effect when vendor subsequently attempted to place purchasers in default and terminate their rights under contract and purchasers were entitled to specific performance thereof by vendor.

W. T. Stockman, Los Angeles, for appellants.

Obegi & High, Jack B. Clark, Van Nuys, for respondent.

FOX, Justice.

This is an appeal by plaintiffs from a judgment of nonsuit in an action for specific performance and damages.

The facts adduced below show that plaintiffs, who are husband and wife and long-time residents of Chicago, visited Los Angeles with the intention of making a capital investment there. Through the offices of Mr. Solon C. Solaris, a real estate salesman employed by the Atomic Realty Company and who served as plaintiffs' representative or agent in the transaction subsequently ensuing, plaintiffs were advised on February 23, 1952, of the availability for purchase of several income units, complete with designated furnishings, owned by defendant. On the same day plaintiff George Katemis delivered to Mr. Solaris a

check in the amount of \$1,000 to be used as a down payment in the purchase of the above property. A receipt dated February 23, 1952, was thereupon prepared by Mr. Solaris which, although failing to acknowledge the receipt of the \$1,000 as a deposit on account of the purchase price, contains a description of defendant's property and describes Mr. Katemis as the purchaser thereof for the sum of \$35,000. The document states that the balance is to be paid into escrow with the Security Bank within two days. In blank lines contained on the receipt appears the following hand-written language: "Seller to furnish rent schedule of all rents from the above mentioned property. No leases on any units which are on the above mentioned property. Termite clearance to be furnished by seller showing property free and clear of termites from a licensed termite operator."

The rest of the writing consists of a printed series of terms embodying more fully the proposed agreement of the parties. The first of these terms provides, in part, for a forfeiture of the amounts paid on account by the purchaser in the event he should fail to pay the balance of the purchase price or complete the purchase as required. Number six states that the property is sold subject to the approval of the owner. Number seven reads: "Time is the essence of this contract; but the time for any act required to be done may be extended not longer than 30 days by the undersigned agent." (Mr. Solaris.) Underneath Mr. Solaris' signature appeared the following: "I agree to purchase the above described property on the terms and conditions herein stated," which plaintiff George Katemis signed. Below this latter signature the instrument reads: "I agree to sell the above described property on the terms and conditions herein stated and agree to pay the above signed broker as a commission the sum of Five hundred dollars, or one-half the deposit in case same is forfeited by purchaser, provided the same does not exceed the full amount of the commission." This statement was signed by defendant seller.

On February 25, 1952, written duplicate escrow instructions were executed by the

parties in counterpart on a form supplied by the escrow holder, the Security-First National Bank of Los Angeles. In the buyers' instructions appears the following pertinent language: "Prior to March 1, 1952, I will hand you \$20,100.00 and any additional funds and instruments required from me to enable you to comply with these instructions, which you are to use provided on or before the date set forth on line 1 above (March 1, 1952), as qualified by the provision at the top of page 2 hereof, instruments have been filed for record entitling you to procure Standard Coverage Form or Joint Protection policy of title insurance * * * on real property in the County of Los Angeles * * * (description of property) showing title vested in George Katemis and Tula Katemis, his wife, as joint tenants, free of encumbrances except all general and special taxes for fiscal year 1952, 1953, * * * and * * * Mortgage or Trust Deed securing an indebtedness * * * now of record * * * of \$14,900.00 * * * and Seller herein will furnish a report from a pest control company, covering termites, dry rot and fungus * * * at (description of property.) If said report discloses infestation, seller agrees to eliminate such infestation and repair damage at his expense, but no preventive work shall be required. Seller authorizes payment for making inspection report if a bill is presented in this escrow * * * Seller will deposit in escrow for delivery to buyer at close of escrow * * * a Bill of Sale in favor of the buyer, covering furniture and fixtures situated in Apartments 2, 3 and 4 of the above described property * *." (Parenthesis added.)

The provision at the top of page two, previously referred to, is as follows: "If the conditions of this escrow have not been complied with prior to the date set out on line one (March 1, 1952), or any extension thereof, you are nevertheless to complete the escrow as soon as the conditions, except as to time, have been complied with, unless written demand shall have been made upon you not to complete it." (Parenthesis supplied.)

The seller's instructions, which follow immediately after the buyers' and were signed at the same time, read in part as follows: "I Hereby Approve And Agree To Be Bound By The Foregoing Instructions And Provisions, Prior To the date set out on line 1 herein. (March 1, 1952.) I will hand you *all instruments* and money necessary for me to comply therewith, including a deed of the property described * * *." (Emphasis added.) Except for the further instruction to pay a commission of \$500 to the Atomic Realty Co., seller's instructions were of a formal and conventional nature and require no recitation.

At the time the escrow was opened, plaintiffs' check for \$1,000, previously deposited with Mr. Solaris, was placed in escrow, leaving a cash balance due of \$19,100. Prior to March 1, 1952, defendant deposited with the escrow holder all instruments called for on her part by the instructions save a termite report. Meanwhile, plaintiffs had departed for Chicago immediately upon the opening of escrow on February 25, 1952, in order to procure the funds required of them. In the early afternoon of February 29, 1952, plaintiffs posted in the United States post office in Chicago, Illinois, a registered air-mail letter addressed to the escrow holder containing a cashier's check in the amount of \$19,350. March 1st and 2d, 1952, being respectively a Saturday and a Sunday, the escrow-bank was closed. The said cashier's check was therefore not applied to plaintiffs' escrow account until Monday, March 3, 1952. Similarly, the termite report to be furnished by seller, which was dated February 29, 1952, was received in escrow on March 3, 1952. This report disclosed a degree of dry rot and infestation with a suggestion as to corrective measures recommended and offered to perform the necessary work for \$925.

On March 5, 1952, defendant wrote to the escrow holder instructing it to cancel the escrow because the "purchasers did not comply with their agreement in said escrow to deposit with you the sum of \$20,100.00 prior to March 1, 1952."

[1] On May 15, 1952, plaintiffs filed the present suit for specific performance and

damages, appending as exhibits to their complaint the deposit slip constituting the offer and acceptance and the escrow instructions as evidence of the entire agreement between the parties. Upon plaintiffs' presentation at the time of trial of the evidence previously related, the court granted defendant's motion for a judgment of nonsuit, from which plaintiffs prosecute this appeal. Since the oral and documentary evidence developed below establish plaintiffs' prima facie right to specific performance, the judgment of nonsuit is clearly erroneous.

[2-5] It may be well to advert here to several prefatory propositions of law relevant to the determination of this appeal. It is well settled that where an agreement is expressed through the medium of a series of writings such documents must be construed collectively in ascertaining the whole contract between the parties. Civ. Code, § 1642. Escrow instructions which are merely a customary and conventional means of consummating an underlying executory contract for the sale of real property do not supplant such agreement but merely serve to carry it into effect. *King v. Stanley*, 32 Cal.2d 584, 589, 197 P.2d 321; *Keelan v. Belmont Co.*, 73 Cal. App.2d 6, 12, 165 P.2d 930. Thus, where the terms of an executory agreement for the sale of real property are clarified and elucidated by the provisions contained in escrow instructions, both instruments are to be considered together in arriving at the total understanding of the contracting parties and in fixing their correlative rights and obligations. *Tetenman v. Malekov*, 90 Cal.App. 625, 266 P. 367; *Hawes v. Lux*, 111 Cal.App. 21, 294 P. 1080; *Pigg v. Kelley*, 92 Cal.App. 329, 332, 268 P. 463; *Thompson v. Walsh*, 76 Cal.App.2d 188, 194, 172 P.2d 745. It is also to be borne in mind that where, as here, a judgment of nonsuit is granted, an appellate court in reviewing such judgment must construe the evidence most strongly against defendant and indulge in every inference and presumption fairly arising from the evidence in favor of plaintiff. *Slater v. Shell Oil Co.*, 39 Cal.App.2d 535, 539, 103 P.2d 1043.

[6-10] It is beyond cavil that plaintiffs herein who are seeking specific performance have tendered in full the entire balance due on the purchase price. Defendant contends that since the time fixed for such performance in the escrow instructions was prior to March 1, 1952, the arrival of plaintiffs' funds on March 3, 1952, was too late and thus defeats their right to specific performance. This argument is untenable, since nowhere is it clearly manifest that deposit of the money by plaintiffs prior to March 1, 1952, is the essence of the contract. Professor Pomeroy, in his treatise on Specific Performance, states "the prescribing a day at or before which, or a period within which, an act must be done, even with a stipulation that it shall be done at or before the day named * * * does not render the time essential with respect to such an act." Sec. 392, p. 835. The general rule in equity is that time is not of the essence unless it has been made so by its express terms or is necessarily so from the nature of the contract. Williston on Contracts, Vol. III (Rev. Ed. 1936), p. 2385. In *Miller v. Cox*, 96 Cal. 339, 31 P. 161, it is stated that the intent to make a particular date, or time, "the essence of the contract must be clearly, unequivocally, and unmistakably shown by an express declaration. * * * In order to render time thus essential, it must be clearly and expressly stipulated that it shall be so; it is not enough that a time is mentioned during which or before which something shall be done [citations]." 96 Cal. at page 345, 31 P. at page 163. This language has in substance been reiterated in *Walsh v. Walsh*, 42 Cal.App.2d 287, 292, 108 P.2d 765; *Cushing v. Levi*, 117 Cal.App. 94, 104, 3 P.2d 958; *Flagler v. Kroonen*, 61 Cal.App. 359, 366-367, 214 P. 1006, and is in consonance with the modern view that valuable contractual rights should not be surrendered or forfeitures suffered by a slight delay in performance unless such intention clearly appears from the contract or where specific enforcement will work injustice after a delayed tender. *Cockrill v. Boas*, 213 Cal. 490, 2 P.2d 774; *Mathews v. Davis*, 102 Cal. 202, 36 P. 358.

[11] Nowhere in the escrow instructions is there any clear-cut language manifesting an intent to make time of the essence. The sole reference therein to this matter appears in the buyers' escrow instructions, agreed to by defendant, providing that if the conditions had not been complied with at the time therein provided, the escrow holder might nevertheless complete the escrow as soon as the conditions (except as to time) had been fulfilled. This somewhat confusing and ambiguous language does not "clearly, unequivocally and unmistakably" show an intent to make time of the essence of the contract. It patently does not expressly declare such to be the intention of the parties, nor does it do so with any degree of reasonable certainty. Escrow instructions containing the identical language were held not to constitute a declaration that time was of the essence. *Lifton v. Harshman*, 80 Cal.App. 2d 422, 433, 434, 182 P.2d 222.

[12] In examining the instrument prepared on February 23, 1952, by Mr. Solaris containing the buyers' offer, which was accepted by defendant, the following time-clause appears: "Time is the essence of this contract, but the time for any act required to be done may be extended not longer than thirty days by the undersigned agent." Here we are confronted with an unmistakable indication that performance by the vendee, on the day nominally appointed, cannot be of crucial significance to the vendor, since Mr. Solaris, the agent of the plaintiffs in this case and under accustomed principles of agency susceptible to direction by his principal, is given the right to defer the performance of any act for an additional thirty days, without even a provision for notice. Under such circumstances, it hardly lies in the mouth of defendant to assert that payment by the vendee before March 1, 1952, was essential or of compelling materiality when the buyers' agent was empowered to extend the performance of this or any other act to a time beyond the dates here involved. To lodge such authority in the buyers' agent is inconsistent with the supposition that the precise time specified for the buyers'

performance is of the essence of the contract.

[13-15] In *Henck v. Lake Hemet Water Co.*, 9 Cal.2d 136, 144, 69 P.2d 849, 853, the following language appears: "The theory upon which the courts hold that in such cases time is of the essence, is that damage resulting to the seller by reason of delay in performance on the part of the purchaser cannot be estimated nor compensated [citations]." Writing on the same theme, it is said in *Vorwerk v. Nolte*, 87 Cal. 236, 240, 25 P. 412; "It is a matter of common understanding that when these words—'time is of the essence of this contract'—are used * * * their purpose is to protect the vendor against delays in payment of the purchase price, and the tying up of his estate beyond the fixed period, without the payment of the agreed compensation therefor * * *." Clearly a delay of three days by vendee in tendering full performance under a contract susceptible of extension by vendee's agent results neither in damage which "cannot be estimated or compensated" nor in tying up the vendor's estate "beyond the fixed period, without the payment of the agreed compensation," when such performance is given within the period possible of extension contemplated by the parties. If any default can be said to have occurred, it was at most a technical and unintentional default, calling for the interposition of section 3392 of the Civil Code, which provides: "Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default."

[16] Defendant's purported cancellation of the contract on March 5, 1952, after full performance by plaintiffs and with no intervening change in circumstances as would render enforcement of the contract inequitable, was, therefore, thoroughly unwarranted.

[17, 18] It is apposite to point out that even were we to consider time of the essence of this agreement, the judgment of nonsuit was nevertheless erroneous. Under the terms of the escrow instructions, plaintiffs agreed to deposit in escrow prior to March 1, 1952, the sum of \$19,150. Defendant seller also agreed that prior to March 1, 1952, she would deposit in escrow all instruments necessary for her to comply with the escrow instructions. These respective obligations, viz., plaintiffs' deposit of the money and defendant's deposit of all requisite instruments, were thus concurrent conditions; that is, they were mutually dependent, each promise given in consideration for the other, and each being due at the same time. Civ.Code, § 1437. This principle is more elaborately set out in section 267 of the Restatement of Contracts as follows: "Promises for an agreed exchange are concurrently conditional, unless a contrary intention is clearly manifested, if the promises can be simultaneously performed * * * where by the terms of the promises

"(a) the same time is fixed for the performance of each promise; or * * *

"(d) the same period of time is fixed within which each promise shall be performed." That this is the accepted modern view is reflected in the following quotation from 12 Am.Jur., Contracts, p. 850: "In brief, the courts will construe promises as dependent unless a contrary intention clearly appears. All promises in a bilateral contract will be regarded as mutually dependent whenever it is possible so to interpret them." California conforms to the rules set out in the sections of the Restatement quoted above. *Lemle v. Barry*, 181 Cal. 6, 183 P. 148; *Hanson v. Slaven*, 98 Cal. 377, 33 P. 266; *Dennis v. Strassburger*, 89 Cal. 583, 26 P. 1070.

[19-22] Applying these rules to the case at bar, it is clear that in a contract for the sale of real estate calling for concurrent performance, neither party can place the other in default unless he is fully able to perform or make a tender of the promised performance. *Dennis v. Strassburger*, supra; *Downes v. Buehrle*, 90 Cal.App.2d

719, 203 P.2d 795; *McDorman v. Moody*, 50 Cal.App.2d 136, 122 P.2d 639. "Before respondents could require appellant to perform his part of the agreement they must have fulfilled all conditions precedent imposed upon them and must have been able to fulfill and must have offered to fulfill all conditions concurrent imposed upon them [citations]." *Lifton v. Harshman*, 80 Cal.App.2d 422, 432-433, 182 P.2d 222, 228. It was not until March 3, 1952, that defendant delivered into escrow the termite report required by the agreement. It was at the same time that plaintiffs completed performance on their part by depositing the full amount of the balance due under the contract. There was present, therefore, what was described in *Kerr v. Reed*, 187 Cal. 409, 414, 202 P. 142, 144, as " * * * the simple situation where both parties to a contract in which time is made the essence thereof, allow the date of final payment to pass without action. Under these circumstances neither party can be subsequently placed in default * * * without a tender [citation]." Since defendant could not have demanded performance from plaintiffs until March 3, 1952, when they had themselves given full performance, and since plaintiffs had on that date deposited the full balance due, it follows that the contract was in full force and effect when on March 5, 1952, defendant attempted to place plaintiffs in default and terminate their rights under the contract. *Kerr v. Reed*, supra; *Lamont v. Ball*, 93 Cal.App.2d 291, 293, 209 P.2d 9; *Urban v. Yoakum*, 89 Cal.App. 202, 208, 264 P. 493.

Defendant cites a number of authorities which are divergent in crucial aspects from the case here presented. In general, they constitute situations where the party praying judgment failed to adhere to the conditions of the agreement prior to commencing suit or where a nondefaulting party had given proper notice of the forfeiture of the defaulting party's rights under the agreement prior to the latter's tender of performance. Thus, in *Evarts v. Johnson*, 34 Cal.2d 6, 206 P.2d 633, the vendees deposited only \$450 of an agreed \$1,150 into escrow before seeking specific perform-

ance; the court found, therefore, that they had failed to comply with the conditions of the contract. In *Cockrill v. Boas*, 213 Cal. 490, 2 P.2d 774, the buyer was required to deposit \$55,000 in escrow. This was not done, nor was tender made prior to suit; hence, he was disentitled to the relief sought. *Boulenger v. Morison*, 88 Cal.App. 664, 264 P. 256, 258, was an action wherein the court found that the real estate broker and the buyer were colluding to defraud the seller into signing an agreement which, as to him, was not "just and reasonable". It was further found that the buyer never placed in escrow the money called for in the contract. In *Davy v. Ogier*, 87 Cal.App.2d 835, 198 P.2d 92, the purchaser seeking specific performance deposited into escrow the full amount due. But the escrow holder could not pay this sum over to the seller because of the buyer's instruction to "hold until O.K. from Mr. Bowman" (buyer's broker). Since this instruction was never revoked, the court ruled that the buyer had not performed within the prescribed time. In *Ward v. Downey*, 95 Cal.App.2d 680, 213 P.2d 523, the court had before it two written agreements which are not set out in full, but which together constituted the agreement of purchase and sale and which provided that time was to be of the essence. The time fixed for closing the escrow was October 10, 1947. On that day, plaintiffs were unable to supply the necessary instruments to convey title to defendants. On October 11, 1947, defendants served written notice of their termination of the escrow as provided by the contract. It was not until October 17, 1947, that plaintiffs were able to convey good title. The court denied specific performance, since plaintiffs had failed to provide the title required by the contract within the time prescribed and defendants thereupon terminated the contract in accordance with the express provision of the escrow instructions.

It would be a work of supererogation, and result in a profitless prolongation of this opinion, to discuss the remaining cases cited, in each of which the party seeking affirmative relief was in such flagrant default under the terms of the agreement as to preclude the award of specific perform-

ance. It is obvious no such considerations are here present to impel a similar result.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.



120 Cal.App.2d 615

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. PETERS et al.

HOUSING AUTHORITY OF CITY OF LOS ANGELES v. MILLER et al.

Civ. 19792, 19793.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1953

Actions by City Housing Authority to condemn property of defendants for construction of a housing project. The actions were consolidated for trial, and the Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment for plaintiff, from which defendants appealed. The District Court of Appeal, McComb, J., held that where the precise question of law had been decided by a District Court of Appeal and the Supreme Court had denied a hearing, such decision would be followed as settling the law in absence of a later decision of Supreme Court overruling or modifying the prior case.

Judgment affirmed.

Courts ⇐90(7)

When the precise question of law has been decided by a District Court of Appeal and Supreme Court has denied a hearing, such decision will be followed as settling the law, in absence of a later decision of the Supreme Court overruling or modifying the prior case.

G. G. Baumen, Los Angeles, for appellants.

Paul, Hastings & Janofsky, Loeb & Loeb, Los Angeles, Leonard S. Janofsky and Herman F. Selvin, Los Angeles, of counsel, for respondent.

McCOMB, Justice.

After trial without a jury, judgment was rendered in favor of plaintiff in the above actions, which were consolidated for trial, condemning the property of defendants under the power of eminent domain for the construction of a housing project. From the judgment defendants appeal.

Defendants concede in their opening brief that the basic points which they raise have been passed on adversely to their contentions in *Housing Authority v. Shoecraft*, 116 Cal.App.2d 813, 254 P.2d 628 (hearing denied by the Supreme Court) (see also *Housing Authority of Los Angeles County v. Dockweiler*, 14 Cal.2d 437, 449 et seq., 94 P.2d 794; *Riggin v. Dockweiler*, 15 Cal.2d 651, 104 P.2d 367), but assert that there is pending before the United States Supreme Court an application for a writ of certiorari to review the decision in *Housing Authority v. Shoecraft*, supra, and they "feel that their points should be asserted herein in order to avoid a waiver in the event the United States Supreme Court should act upon and decide the *Shoecraft* case in a different manner."

The facts in *Housing Authority v. Shoecraft* are in all material aspects the same as those in the case at bar. Therefore we are bound by the foregoing decisions, the correct rule being that when the precise question of law has been decided by a District Court of Appeal and the Supreme Court has denied a hearing, such decision will be followed as settling the law in the absence of a later decision of the Supreme Court overruling or modifying the prior case. (*Bridges v. Fisk*, 53 Cal.App. 117, 122, 200 P. 71; *People v. Whitaker*, 68 Cal.App. 7, 11 et seq., 228 P. 376; *Clover v. Jackson*, 81 Cal.App. 55, 59, 253 P. 187; *Masonic Mines Ass'n v. Superior Court*, 136 Cal.App. 298, 300, 28 P.2d 691; *Skaggs v. Taylor*, 77 Cal. App. 519, 524, 247 P. 218.)

Since no useful purpose would be served by reiterating the rules of law set forth in the above opinions and applying them to the

analogous facts of the present cases, we refrain from a detailed discussion of the points argued in the briefs. (See *Thatch v. Livingston*, 13 Cal.App.2d 202, 203, 56 P.2d 549.)

Each judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



120 Cal.App.2d 593

KRUG v. REPUBLIC PICTURES CORP.

Civ. 19437.

District Court of Appeal, Second District,
Division 2, California.

Oct. 9, 1953.

Proceeding in the matter of the petition of one acting in a representative capacity for union to compel arbitration by employer of a dispute under terms of collective bargaining agreement. The Superior Court of Los Angeles County entered judgment adverse to petitioner, and petitioner appealed. The District Court of Appeal, Fox, J., held that union was entitled to arbitration of dispute.

Judgment reversed with directions to order arbitration.

Labor Relations 434

Where collective bargaining agreement between union and employer provided that all grievances and disputes arising under terms of agreement should be arbitrated and that agreement covered all office employees except certain named positions including that of booker-office manager, union was entitled to arbitration of dispute whether booker-office manager was performing duties of a booker covered by agreement. Code Civ.Proc. § 1282.

Loeb & Loeb, Harry B. Swerdlow and Frederick M. Nicholas, Los Angeles, for respondent.

FOX, Justice.

Petitioner, acting in a representative capacity for Local 174 of the Office Employees International Union, A. F. of L., seeks to compel arbitration of a dispute under the terms of a collective bargaining agreement between the Union and Republic Pictures.

On July 5, 1951, the Union entered into a collective bargaining agreement with Republic covering a 2-year period from April 21, 1951. This agreement, however, was extended for an additional two years. The agreement covers all office employees of the Los Angeles Exchange of respondent except certain named positions, among which is that of "Booker-Office Manager," which is here involved. This position, together with certain others, is exempt from the operation of the agreement by its express terms. The agreement provides that "all grievances and disputes arising under this agreement," which are not settled between the parties or by the grievance committee shall be settled by arbitration. Excluded, however, from the grievance and arbitration provision are "the terms of a new agreement or changes in wages, hours or working conditions." At the time this agreement was executed, and for some years prior thereto, the position of booker-office manager had been held by Carl Bryant. He severed his connection with Republic on September 28, 1951. Thereupon Wendell A. Overturf was promoted to the position. Soon thereafter petitioner demanded that Overturf desist and refrain from performing the duties of booker on the ground that this was a job for which the Union is the collective bargaining representative and which is covered by the collective bargaining agreement between the Union and Republic. In a letter to respondent on November 10, 1951, petitioner stated "the grievance of the Union is the fact that Republic * * * is directing and having an employee in an exempt position perform work covered by the existing agreement in violation thereof." Upon respond-

Bodle & Landye, George E. Bodle and Alex D. Fred, Los Angeles, for appellant.

ent's refusal to accede to petitioner's request the latter demanded that the matter be arbitrated. Respondent declined to arbitrate on the ground that the position of booker-office manager was exempt from the provision of the agreement and that Mr. Overturf was performing the duties previously performed by Mr. Bryant. Thereupon petitioner filed his petition to compel arbitration. He also filed an affidavit in which he states that he is now and has been the business representative of the Union since approximately January, 1946; that the duties of booker-office manager were exempt from the bargaining unit and from the agreement because of the supervisory nature of the duties of this job which excluded the performance of any of the duties of the job title "booker," which job is covered under the collective bargaining agreement; that, in fact, the position of booker-office manager since 1946, up to and approximately September, 1951, was held by one Carl Bryant, and during this period Carl Bryant did not perform the duties of booker with the knowledge and consent of the Union "nor the undersigned, except during periods of emergency when employees covered under the collective bargaining agreement were unavailable to perform the work of booker, and it was necessary to maintain the flow of business of the company during these periods." He stated also that if Bryant had performed the duties of booker at other times the same were performed sub rosa and without his knowledge or consent or that of the Union. Jack Dowd, who since January 1, 1951, had been branch manager in charge of distribution of motion pictures by respondent in its Los Angeles Film Exchange, filed an affidavit in opposition in which he stated, "The duties of this booker-office manager have always involved two matters: (a) the miscellaneous duties of supervising the several employees of the film exchange and handling the mail; and (b) the booking of film for exhibition." He also stated that the "type of duties performed by Mr. Overturf and the conditions of his employment are identical with those previously affecting Mr. Bryant," and that the nature of both Mr. Bryant's and Mr. Overturf's du-

ties have always been made known to representatives of the Union.

The trial court denied petitioner any relief. In this the court was in error.

This petition is brought under section 1282 of the Code of Civil Procedure, which provides that the court, "upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." There is no dispute as to the making of the agreement or the refusal to arbitrate. The court found that the "position of booker-office manager is exempt from the scope of the collective bargaining agreement" and that "arbitration concerning this position is not required under the terms of said * * * agreement." The court thereupon concluded: "Petitioner may not require respondent to arbitrate matters concerning the position of booker-office manager, a position specifically exempt from the scope of the collective bargaining agreement between the parties." It is apparent from the foregoing finding and conclusion that the court misconceived the question at issue. The position of booker-office manager was expressly exempt from the collective bargaining agreement and there was no claim to the contrary. The problem at issue was whether or not the person who occupies this exempt position was entitled to perform the duties of a booker. As previously noted, the exempt position is designated as "booker-office manager." However, the scope of the duties of that position are neither defined nor described. In this connection it should be pointed out that such job titles as apprentice booker, booker, and head booker are included within the coverage of the agreement, but there is no description or enumeration of the respective duties of these job classifications. Thus there is neither a definition nor a description in the agreement of the duties appertaining to the exempt position nor to the job title of booker. Hence we have petitioner asserting in his affidavit that the job duties of booker-office manager "excluded the performance of any of the duties of the job

title of 'booker' " and that Bryant, who had formerly held this exempt position, had not performed the duties of the job title of booker except during periods of emergency when employees covered under the collective bargaining agreement were unavailable for such work, unless such services had been performed by him surreptitiously, without petitioner's knowledge as business agent or the knowledge of the Union. On the other hand, Mr. Dowd, who had served as branch manager of respondent's local film exchange during the last nine months of Bryant's service, asserted in his affidavit that the booking of films for exhibition was part of the duty of this exempt position; that the duties performed by Overturf were identical with those previously performed by Bryant, and that the duties of both these employees had always been made known to the representatives of the Union.

There is thus clearly presented an issue of fact as to whether the person holding the exempt position of booker-office manager was entitled, under the agreement, to regularly perform the duties of booker, or whether he was entitled to perform such duties only during emergencies. The provision of the agreement that "all grievances and disputes arising under the terms of this agreement" shall be arbitrated is obviously sufficiently broad to cover the dispute here involved. *Lipman v. Hauser Shellac Co.*, 289 N.Y. 76, 43 N.E.2d 817, 819, 142 A.L.R. 1088. It was therefore the clear duty of respondent under the agreement, to arbitrate this matter, and having refused to do so, the court should have made "an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." Code Civ.Proc. sec. 1282; *Myers v. Richfield Oil Corp.*, 98 Cal.App. 2d 667, 671, 220 P.2d 973; *Utah Const. Co. v. Western Pac. Ry. Co.*, 174 Cal. 156, 159,

162 P. 631; *Royal Typewriter Co. v. Mechanical & E. Wkrs. Union*, Sup., 104 N.Y.S.2d 332.

There is no merit in respondent's contention that the dispute between the parties concerned matters outside the scope of the collective bargaining agreement and the arbitration provision thereof. Respondent argues that petitioner "is seeking to arbitrate with reference to a job category specifically exempt from the provisions of the collective bargaining agreement and at the same time thereby through arbitration is seeking to effect a change in working conditions contrary to the terms of the collective bargaining agreement." Respondent is in error in both these respects. Petitioner is not seeking arbitration as to whether the position of booker-office manager is exempt from the provisions of the agreement. Petitioner recognizes that such position is expressly exempt from its provisions. There is likewise no basis for the suggestion that petitioner, through arbitration is seeking to effect a change in working conditions contrary to the terms of the agreement. The problem here is not one of working conditions. The question is simply whether the person occupying the exempt position of booker-office manager is performing duties in violation of the collective bargaining agreement. The trial court fell into the error of attempting to decide the merits of the controversy. That was a question that must be left to the determination of the Arbitration Board. Code Civ.Proc. sec. 1282; *Myers v. Richfield Oil Corp.*, supra; *Royal Typewriter Co. v. Mechanical & E. Wkrs. Union*, supra.

The judgment is reversed with directions to order arbitration in accordance with the agreement of the parties.

MOORE, P. J., and McCOMB, J., concur.

120 Cal.App.2d 578

RICE v. BROWN et al.
Civ. 19515.

District Court of Appeal, Second District,
Division 1, California.
Oct. 8, 1953.

Action by former employee, who was employed under contract whereby he was to receive percentage of profits for services, for amount allegedly due from employer. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., entered judgment for employee in an amount already deposited by employer with court, and the employee appealed. The District Court of Appeal, Scott, J. pro tem, held that evidence supported finding that parties had entered into oral agreement which had effect of settling difference of opinion as to basis on which employee was to receive further money upon termination of contract of employment and implied finding that there was sufficient consideration to support such agreement.

Judgment affirmed.

I. Compromise and Settlement ⇨23(3)

In action by former employee, who was employed under contract whereby he was to receive percentage of profits for services, for amount allegedly due from employer, evidence supported finding that parties had entered into oral agreement which had effect of settling difference of opinion as to basis on which employee was to receive further money upon termination of contract of employment and implied finding that there was sufficient consideration to support such agreement.

2. Contracts ⇨53

The law will not weigh the quantum of consideration, and so long as it is something of real value in the eye of the law it is sufficient, and inadequacy of consideration is for parties to consider at time of making agreement, and not for court when agreement is sought to be enforced.

Arthur L. Ball and Chester C. Kempley,
by Chester C. Kempley, Los Angeles, for
appellant.

Harry William Elliott and Staples &
Meifert, Los Angeles, for respondent.

SCOTT, Justice pro tem.

Plaintiff appeals from an adverse judgment in an action for money brought by him against his employer. A judgment favorable to plaintiff following an earlier trial of the same case before another judge was reversed on appeal, 104 Cal.App.2d 100, 231 P.2d 65. This resulted in the second trial concerning the outcome of which plaintiff now expresses his dissatisfaction.

The complaint named two defendants, Jack A. Brown and his son William A. Brown. The latter was a nominal defendant and from the adverse judgment as to him plaintiff has taken no appeal. We shall refer to defendant (respondent) Jack A. Brown merely as defendant.

It was stipulated at the trial that the relationship of plaintiff and defendant was that of employee-employer. Defendant was a plastering contractor. He employed plaintiff, an experienced estimator, to make estimates on prospective plastering jobs and to assist in procuring contracts. Payment for such services was to be a percentage of the profits.

Upon the trial of the case plaintiff established a prima facie right to an accounting. Thereupon the trial proceeded on the issue of defendant's affirmative defense that there had been a new oral agreement which was referred to as an account stated between the parties.

Under the original agreement of the parties plaintiff's compensation was to be calculated as follows: From the profit on a job defendant was to deduct and retain two percent of the gross cost, plus \$100 per week, plus 50 percent of the balance; plaintiff was to receive the other 50 percent of the balance. Plaintiff's share was later reduced to 33⅓ percent of the balance, at a time when he agreed that defendant could put his son, William A. Brown, to work and that the balance of the profits would be divided equally among the three of them.

On July 1, 1946, defendant notified plaintiff and William A. Brown that their employment would end August 1, 1946. At the trial he testified that about the time that he

so notified them, "I told them that I would finish the contracts, all that we had on the books, and they would participate in their share of the ones that were under construction, that is, the plastering was started, but on the ones that had not been started they would not participate". To this statement he testified that plaintiff replied, "All right". He also testified that at a conference on July 31, substantially the same conversation took place, to the effect that plaintiff would not be paid for jobs on which work had not then been commenced.

Plaintiff contends that the original agreement between the parties provided that the percentage of profit to be paid plaintiff should be calculated on all contracts estimated or secured by him. He urges that defendant had no right to state that plaintiff's share would be limited to contracts on which work had been started before August 1, 1946.

The trial court found that the original agreement of the parties was that this percentage of profits to be paid plaintiff was "from the operations of the entire plastering-contracting business". It further found as follows:

"3. The Court further finds that on the first of July, 1946, Jack A. Brown notified the plaintiff and William A. Brown that their employment on a profit sharing or participating basis as hereinbefore found by this Court, would terminate on August 1, 1946. On July 1, 1946, Jack A. Brown further stated that he would finish to completion all contracts then on hand, all of which were in the name of Jack A. Brown; and further stated to plaintiff and to William A. Brown that upon the termination of their employment, they would participate or share, under the terms of their employment, in the profits resulting from all of the contracts on which any work had been performed in proportion to the performance of the contracts on which work had been commenced at the time of the termination of their employment. Jack A. Brown further stated that he would call in an outside auditor and have his books audited to determine the amount of the profit in the aggregate in which plaintiff and William A. Brown would be entitled to participate un-

der their arrangement with him; that he would submit a statement of such auditor to the plaintiff and William A. Brown, and would give them and each of them a supplemental report and account from time to time showing the progress of completion of each of the contracts in the profits of which they would be entitled to participate, and the amount of profits accruing under each of said contracts. The plaintiff and William A. Brown made no objections to such proposed method of accounting and division of the profits, and acquiesced therein."

The trial court further found that the parties agreed as to such contracts on which plaintiff's earnings were to be figured, that the books of defendant Jack A. Brown were audited, the payments due plaintiff were ascertained, were made to plaintiff and were accepted by him as they accrued, and that \$10,500 had been paid to plaintiff. It further found that \$882.76 was still due him and that defendant had already deposited that amount of \$882.76 with the court. The trial court concluded that the conduct of the respective parties resulted in an account being stated between them and gave judgment for plaintiff for the amount deposited with the court.

In his opening brief plaintiff makes the following statement:

"The findings of fact, if the evidentiary matter is sifted down to ultimate facts, and if all conflicting evidence is disregarded and the evidence is construed most favorably to Respondent, contain ultimate facts which find support in the evidence." He contends that the findings are not sufficient to support the judgment.

[1] From evidence adduced at the trial, the court was justified in finding that there was an oral agreement between the parties entered into about July 1, 1946, which had the effect of settling a difference of opinion that existed between them as to the basis upon which plaintiff was to receive further money from defendant. There was evidence of a serious disagreement between them based upon asserted business conduct on the part of plaintiff which, in the opinion of defendant, was inconsistent with continuing service by plaintiff under their

original agreement. It was to plaintiff's financial interest to have defendant go forward with contracts already commenced which the latter agreed to do although he stated that he was operating under a severe mental and physical strain. Defendant went ahead with his part of the agreement and had audits made, records kept and payments forwarded to plaintiff. There was testimony that from August 1, 1946, to December, 1947, these payments were thus forwarded to and accepted by plaintiff without any notice by him to defendant that he was making a claim for any sums beyond those which would accrue under the agreement entered into in July, 1946. During this period of time plaintiff was doing nothing in the operation of the business or securing new contracts which would enable defendant to continue to carry on his business in the future, because his employment had been terminated. It was not until he had received substantially all of the benefits under his agreement of July, 1946, that he undertook to repudiate it and to seek additional money. The evidence discloses that he knew the effect of the new agreement. He knew that work under other contracts had been started without any payment to him of any percentage of profits. He complained in private conversations with a bookkeeper of defendant, but what he said was not told to defendant.

There was evidence that plaintiff avoided any statement to defendant which in any way would be a repudiation of the agreement under which he was receiving substantial payments. We are unable to say that the implied finding of the trial court that there was sufficient consideration to support the agreement of July, 1946, is without evidentiary basis. Plaintiff was free to reject defendant's offer of the new agreement but he chose to accept it and having done so, is bound by its terms.

[2] "The law will not weigh the quantum of consideration, and so long as it is something of real value in the eye of the law it is sufficient. * * * The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agree-

ment, and not for the court when it is sought to be enforced." 17 C.J.S. Contracts, § 127, page 474.

We have considered the cases cited by plaintiff, dealing with questions raised by him in this appeal and declaring principles of law which are well settled as to the right of a salesman to his commission, and the essential characteristics of an account stated. We find no law which precludes parties from freely entering into an agreement as the trial court found they did in this case, even though their words and acts were such that they did not fit with precision into only one legal category.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.



120 Cal.App.2d 474

SMITH v. SMITH.

Civ. 15881.

District Court of Appeal, First District,
Division 1, California.

Sept. 30, 1953.

Proceedings for modification of custody order that awarded one child to mother and made no disposition of child born after custody order. The Superior Court, County of Contra Costa, Wakefield Taylor, J., modified order by awarding custody of both children to father and the mother appealed. The father, while the children were still in the custody of the mother pending appeal, took the children and removed them and himself from California. The District Court of Appeal, Peters, P. J., directed the father to show cause why he should not be held guilty of contempt and the father made a "special appearance" objecting to the jurisdiction of the court over the subject matter and his person. The court held that it had acquired jurisdiction over the father upon the appearance of the attorney since personal jurisdiction had

properly attached due to the continuity of the action.

Order in accordance with opinion.

1. Divorce ⚭312.4

Where mother appealed from order granting custody of children to father, and mother had formerly had custody, the legal effect of appeal was to stay operation of the order appealed from, and pending appeal custody of children remained with the mother.

2. Divorce ⚭312.4

Under statute providing that an appeal stays all further proceedings in the court below upon judgment or order appealed from, or upon matters embraced therein, an appeal from an order modifying custody order has effect of depriving superior court of all jurisdiction over the matter relating to custody and results in appellate court gaining incidental jurisdiction to protect subject matter pending appeal. Code Civ. Proc. § 946.

3. Divorce ⚭312.4

A trial court has no jurisdiction to punish by contempt, or otherwise, a violation of a custody order from which an appeal has been taken.

4. Divorce ⚭312.4

Where proceedings subsequent to divorce decree had resulted in award of children to father, but father took children from state during pendency of mother's appeal and ignored appellate court's orders to show cause and to return children, appellate court had jurisdiction to punish for contempt. Const. art. 6, § 4b; Code Civ. Proc. § 177, subd. 2; §§ 178, 187, 1209, subs. 5, 8; Pen. Code, § 166.

5. Divorce ⚭312.4

Where proceedings subsequent to divorce decree had resulted in award of children to father, but father took children from state while mother's appeal was pending, and appellate court issued order to show cause why father should not be punished for kidnapping the children, and ordered father to return children, father who ignored all orders, was guilty of contempt. Const. art. 6, § 4b; Code Civ. Proc. § 177,

subd. 2; §§ 178, 187, 1209, subs. 5, 8; Pen. Code, § 166.

6. Appeal and Error ⚭492

For purposes of punishment for violation of a stay of proceedings pending appeal, there is no distinction between a stay raised by operation of law and one raised by order of supersedeas.

7. Appearance ⚭9(2)

By objecting to the jurisdiction of the court over the subject matter as well as over the person, the party appearing must be deemed to have made a general appearance and waived all objections to jurisdiction over his person.

8. Divorce ⚭312

Where father had obtained order for custody of children but children had remained with mother pending her appeal, and father took children and left the state, and appellate court directed father to show cause why he should not be punished for contempt, and father's attorney made a special appearance on question of jurisdiction of the court over the subject matter and the person, the appellate court acquired jurisdiction over the father upon the appearance of his attorney.

9. Motions ⚭22

Once personal jurisdiction has properly attached in a continuous proceedings, parties are subject to orders made without personal service, but may be served by service upon their attorney or personal service outside of the state.

10. Divorce ⚭312

Where original divorce proceedings made custody order as to one of the children born to the parties, and subsequent modification of order changed original order in favor of the father, and pending appeal father took children and left jurisdiction, and father knew that he was violating stay pending appeal, personal jurisdiction of father was secured by service upon father's attorney of order to show cause why father should not be cited for contempt. Pen. Code, § 166, subs. 4, 5; Code Civ. Proc. § 1209, subs. 5, 8.

11. Divorce $\S$ 226, 227(1)

In contempt proceedings for violation of child custody order, affidavits filed by mother established that mother was in need of funds and that father was able to pay, and that mother's reasonable attorney's fees to date were \$350.

Edises & Treuhaft, Oakland, for appellant.

Carlson, Collins, Gordon & Bold, Richmond, Fitzgerald, Abbott & Beardsley, Oakland, for respondent.

PETERS, Presiding Justice.

Proceeding in contempt.

[1] Barbara and Walter Smith were married in 1940, and separated in 1949. Divorce proceedings were instituted in February of 1949. The couple had two children, Amanda born in 1943, and Eric born in 1949, after the entry of the interlocutory decree. The wife secured the divorce on the ground of cruelty. The decree became final in 1950. By that decree Barbara Smith was awarded the care and custody of Amanda, with a right of visitation in the father, and with a further right in the father to have Amanda on such week ends, holidays or vacation periods "as may be mutually agreed on by plaintiff and defendant." Nothing was said in the decrees as to the custody of Eric, but after his birth he remained in the physical care and custody of his mother. Late in 1952 a dispute arose between the parties over the custody of the children, resulting in several court actions, including a motion by the father for a modification of the custody order in reference to Amanda, and for a custody order in reference to Eric. In February, 1953, the trial court entered its order modifying the divorce decree by changing the custody of Amanda from the mother to the father, and by awarding the father custody of Eric. The mother promptly appealed from such order, and such appeal is now pending in this court. The legal effect of such appeal was to stay the operation of the order appealed from, so that, pending the appeal, subject only to the order of this court, legal custody of the two children re-

mained in the mother. *Lerner v. Superior Court*, 38 Cal.2d 676, 242 P.2d 321; *Gantner v. Superior Court*, 38 Cal.2d 688, 242 P.2d 328; *Gantner v. Gantner*, 38 Cal.2d 691, 242 P.2d 329; *In re Barr*, 39 Cal.2d 25, 243 P.2d 787.

After the notice of appeal was filed, the lower court, after proper notice, made its order for the support of the two children pending appeal, and as part of that order recited a stipulation of the parties that neither would "unlawfully disturb" the custody pending appeal.

The father, as permitted by law, thereafter petitioned this court for an order permitting him to have the custody of the two children pending the appeal. On April 27, 1953, this court denied the petition, but at the same time attached the following conditions to the denial order: "No delay will be countenanced in the perfecting of this appeal. If the record is not promptly filed, or if appellant's opening brief is not filed promptly, the court will entertain a motion to dismiss." The record on appeal was promptly filed. Had not respondent father sought to take the law into his own hands, the briefs in this case would have long since been filed, the cause would have been placed on not later than our August calendar, and, very likely, by the present date, the decision on appeal would have been rendered.

But respondent was not satisfied to allow the law to take its course. With full knowledge of the legal effect of the statutory stay pending appeal, it appears from the uncontradicted affidavits filed in this proceeding, that on June 8, 1953, respondent forcefully kidnapped both children, Eric from his home, and Amanda, from her school classroom, with the intent and purpose of interfering with and defeating the jurisdiction of this court in the appeal then pending. It also appears that the children were taken to Utah by the father and secreted there. Diligent efforts of appellant and her counsel to locate the children or respondent have been unavailing. The appellant thereupon petitioned this court for an order directing respondent to return the the children to this state or to show cause why he should not be found guilty of a contempt. This order to show cause was

served on the attorneys for respondent, appellant being unable to find respondent so as to serve him personally. Thereafter, respondent filed what he calls a "special appearance," objecting to the jurisdiction of this court over the subject matter and over his person. On July 13, 1953, this court, after a hearing, issued the following order:

"This Court finds as a fact that under the affidavits now on file, the respondent has improperly and unlawfully removed the children from the State of California.

"We further find that such acts were committed with the intent and have the legal effect of defeating the jurisdiction of this Court.

"It is therefore ordered that the respondent is ordered to return Amanda and Eric Smith to the State of California and to the custody of Barbara Smith on or before August 1, 1953.

"We retain jurisdiction to supplement this order in the event such is necessary.

"The petition for contempt and the application for attorney's fees are continued to the August 24, 1953, calendar; counsel for the respondent is granted ten days from date to file a memoranda on the points discussed at the oral argument and counsel for appellant is granted ten days thereafter to answer that memoranda."

At the August 24, 1953, hearing it developed that such order had been served on respondent's attorneys because, after diligent effort, appellant or her counsel had been unable to locate respondent. It also appeared at that time that the children had not been returned, and, after diligent efforts, could not be found. Although offered the opportunity to do so, counsel for respondent declined to make any argument or defense on the merits, electing to rely solely on the defenses raised upon the so-called special appearance.

[2] It is the first contention of the respondent that the only order violated was the original custody order in reference to Amanda found in the divorce decree, and

that the trial court alone has jurisdiction to punish for violation of that order. In other words, respondent contends that this court has no jurisdiction over the subject matter. The argument is unsound. From the statement of facts, *supra*, it appears that the trial court has modified the custody order in reference to Amanda, and granted such an order in reference to Eric. The mother has appealed. It is provided in section 946 of the Code of Civil Procedure that an appeal "stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein". This section has two effects: First, it deprives the superior court of all jurisdiction over any matter relating to the custody of the children pending appeal, and second, it results in the appellate court gaining an incidental jurisdiction to protect the subject matter pending the appeal.

[3] The first of these propositions is settled beyond dispute. By the appeal the trial court has lost all jurisdiction over its prior custody orders. *Lerner v. Superior Court*, 38 Cal.2d 676, 242 P.2d 321; *Gantner v. Superior Court*, 38 Cal.2d 688, 242 P.2d 328; *Gantner v. Gantner*, 38 Cal.2d 691, 242 P.2d 329; *In re Barr*, 39 Cal.2d 25, 243 P.2d 787. In the *Lerner* case, *supra*, it is stated, 38 Cal.2d at page 680, 242 P.2d at page 323, that: "The loss of jurisdiction [by the trial court as a result of the appeal] is so complete that even the consent of the parties is ineffective to reinvest the trial court with jurisdiction." In *France v. Superior Court*, 201 Cal. 122, 255 P. 815, 52 A.L.R. 869, it was held that, although the Constitution grants concurrent jurisdiction over habeas corpus to trial and appellate courts, the trial court, in custody cases, where an appeal has been taken, has no authority to issue the writ. In the case of *In re Lukasik*, 108 Cal.App.2d 438, 239 P.2d 492, it was held that custodial orders were so stayed by an appeal that even a guardianship proceeding instituted by third persons was void and should be stayed. The appellate court ordered that any trial court proceedings should be prohibited "which will in any manner or to any degree affect the custody of these

minors, pending the appeal". 108 Cal.App. 2d at page 446, 239 P.2d at page 497. The court also held, 108 Cal.App.2d at page 445, 239 P.2d at page 496, that "the perfecting of the appeal stays the hand of the respondent court during the pendency thereof and that neither directly nor indirectly can the respondent court further act upon the subject matter of the cause, jurisdiction over which has by the appeal been transferred from respondent court to the appellate court." See, also, *Ex parte Queirolo*, 119 Cal. 635, 51 P. 956. These cases establish that the trial court has no jurisdiction to punish by contempt or otherwise a violation of a custody order from which an appeal has been taken.

The above cited cases also broadly imply or directly hold that once an appeal has been taken from a custody order the appellate court has jurisdiction over any proceedings necessary to protect the subject matter pending the appeal, which, of course, would include a contempt proceeding, where appropriate. Thus, in the case of *In re Barr*, 39 Cal.2d 25, 243 P.2d 787, the appellate court properly issued habeas corpus to restore the status quo existing at the time the appeal was perfected. See, also, *In re Browning*, 108 Cal.App. 503, 291 P. 650; *In re Dupes*, 31 Cal.App. 698, 161 P. 276.

[4,5] The respondent seems to be laboring under the misconception that all that is involved is a violation by him of the original divorce decree awarding custody of Amanda to appellant, and contends that no appeal was taken from that order. Such argument overlooks the fact that the law provides a stay from the order appealed from, and that respondent has violated that stay. This court gave respondent the opportunity to show cause why he should not be punished for kidnapping the children, but this order he ignored. This court then ordered him to return the children, which order he also ignored. Thus, he is in contempt of all of these orders.

There is both statutory and constitutional authority granting to this court the contempt power, where necessary, to protect the appellate power. Article VI, § 4b, of the Constitution, grants to appellate courts

not only the power to issue prerogative writs, but also the "power to issue * * * all other writs necessary or proper to the complete exercise of their appellate jurisdiction." Section 166 of the Penal Code, in subdivision 4, provides that it is a criminal contempt if there is a "Willful disobedience of any process or order lawfully issued by any court", while subdivision 5 provides that it is a criminal contempt if there is any "Resistance willfully offered by any person to the lawful order or process of any court". Section 1209 of the Code of Civil Procedure defines as a contempt (subd. 5) "Disobedience of any lawful judgment, order, or process of the court", and in subdivision 8, "Any other unlawful interference with the process or proceedings of a court". Section 177 of the same code provides that "Every judicial officer shall have power * * * 2. To compel obedience to his lawful orders as provided in this code". The very next section provides that: "For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this code." Section 187 of the Code of Civil Procedure contains some relevant language. It provides: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

[6] There is at least one case where the Supreme Court found a party in contempt for violation of a stay order. That case is *Romine v. Cralle*, 83 Cal. 432, 23 P. 525. While the stay in that case existed by reason of an order of supersedeas, while in the instant case it is created by operation of law, there is no legal distinction between the two situations. While in *Olcott v. Superior Court*, 68 Cal.App.2d 603, 157 P.2d 36, a party was held in contempt by the trial court in a situation similar to the one here involved, the opinion does not discuss

the question as to whether the contempt proceeding should have been in the appellate court. That point was not raised and therefore that case is not controlling on that issue. In *re Estate of Cushing*, 113 Cal.App.2d 319, 248 P.2d 482.

For these many reasons it must be held that this court has jurisdiction over the subject matter.

The next contention of respondent is that since he has not been personally served, this court lacks jurisdiction over his person. Respondent has made what he terms a "special appearance," but in the notice counsel stated that the appearance is "for the purpose only of objecting to the jurisdiction of this court over the respondent or over the subject matter." The first heading in the memoranda filed in support of the notice is: "This court is without jurisdiction of the subject matter or the respondent." A substantial, and, indeed, the greater portion of the memoranda is devoted to a discussion of the claimed lack of jurisdiction over the subject matter.

[7] Whatever may be the rule in other states, the rule in California is that by objecting to the jurisdiction of the court over the subject matter as well as over the person, the party appearing must be deemed to have made a general appearance and has waived all objections to jurisdiction over his person. In the leading case of *Olcese v. Justice's Court*, 156 Cal. 82, 103 P. 317, it is directly held that a litigant sacrifices his objection to a personal jurisdiction by, at the same time objecting to the court's jurisdiction over the subject matter. There, contrary to the law applicable to the pleadings on file, the defendant was served outside the county where the action was instituted. He moved to quash service and also demurred on the ground that the trial court had no jurisdiction of the subject matter. This was held to constitute a general appearance and a waiver of the claimed improper service. 156 Cal. at page 87, 103 P. at page 318, the court stated: "For, notwithstanding the alleged defect in the service on him of the summons, if he made a general appearance in the justice's court, he will be bound by that appearance as having waived the informality

of his summons. Pleas based upon lack of jurisdiction of the person are in their nature pleas in abatement, and fined no especial favor in the law. They amount to no more than the declaration of the defendant that he has had actual notice, is actually in court in a proper action, but, for informality in the service of process, is not legally before the court. It is purely a dilatory plea; and when a defendant seeks to avail himself of it, he must, for very obvious reasons, stand upon his naked legal right, and seek nothing further from the court than the enforcement of that right. He will not be heard to ask of the court anything further than an adjudication upon his plea, and if he does ask anything further, then, by logic of the fact, he must necessarily have waived the irregularity of his summons before the court. Here is one reason for the well-settled rule that, if a defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection. Another reason, equally valid, is that if such defendant shall ask for any relief other than that addressed to his plea, he is seeking to gain an unconscionable advantage over his adversary, whereby, if the determination of the court be in his favor, he may avail himself of it, while, if it be against him, he may fall back upon his plea of lack of jurisdiction of the person. So it is well settled that, if a defendant, under such circumstances, raises any other question, or asks for any relief which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general, though termed special, and he thereby submits to the jurisdiction of the court as completely as if he had been regularly served with summons."

Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826, is closely analogous to the instant case. In that case a motion to set aside a prior divorce proceeding was made. As in the instant case, the adverse party was not served personally, but service was made upon her attorney. Such attorney objected to the jurisdiction of the trial court over the subject matter. On appeal from the

order setting aside the divorce decree the appellant sought to contend that the trial court had not secured jurisdiction over her person. The court squarely reaffirmed the rule of the Olcese case, and, citing that and other cases, held, 20 Cal.2d at page 384, 125 P.2d at page 827: "The appearance in court of the attorney in behalf of the executrix for the purpose of challenging the jurisdiction of the court to entertain the motion on the ground that the court had no jurisdiction over the subject matter, constituted a general appearance by the executrix. This is so even though it be assumed, in the absence of a record showing the fact, that the attorney also interposed an objection to the jurisdiction of the person of the executrix." See, also, *Molfino v. Pippo*, 122 Cal.App. 437, 10 P.2d 78; *Lacey v. Bertone*, 33 Cal.2d 649, 203 P.2d 755; *MacPherson v. Superior Court*, 22 Cal.App.2d 425, 71 P.2d 91.

Respondent argues that the rule of these cases is limited to situations where the party seeks some affirmative relief. Even if the rule were so limited, the rule would be here applicable because respondent is seeking a favorable decision on the issue of lack of jurisdiction over the subject matter and that, of course, is an attempt to secure affirmative relief.

While it is true that the rule of the Olcese and Raps cases has been criticized (see 30 Cal.L.Rev. 690; dissent of Mr. Justice Traynor in *Judson v. Superior Court*, 21 Cal.2d 11 at page 15, 129 P.2d 361, the rule of these cases has not been overruled and is binding on an intermediate appellate court. It must be held, therefore, that by objecting to the jurisdiction over the subject matter the respondent has made a general appearance that amounts to a waiver of the claimed defective service over his person.

[8,9] However, even if it be held that respondent has not made a general appearance, nevertheless we are of the view that this court properly secured jurisdiction over respondent by service upon his attorneys. If this were not a contempt proceeding, there would be no doubt of the law on this subject. The court has modified the

final decree as to custody. The wife has appealed. The respondent, in that proceeding, sought an order of this court to grant him custody pending appeal. In that petition for change of custody, signed and sworn to by respondent, he avers that the appeal operated as a stay, so that it definitely appears that he had full knowledge of that fact. Respondent then, in an attempt to defeat the appellate jurisdiction of this court, kidnapped the children and took them to Utah, the state of his present residence, and has there so secreted himself and the children that it has been impossible to secure personal service upon him or the children. Thus, the proceeding has been a continuous one. This contempt proceeding is part and parcel of the original divorce proceeding. Respondent has deliberately concealed himself to avoid service. Personal jurisdiction was secured over the respondent in the divorce action and in the custody proceeding. It is well settled law that once personal jurisdiction has properly attached in a continuous proceeding, parties are subject to orders made without personal service, but may be served by service on their lawyers or personal service outside the state. The leading case is *Michigan Trust Co. v. Ferry*, 228 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867. In that case an administrator left state "A" and went to state "B" owing the estate over a million dollars. An action was commenced in state "A" against the administrator to recover the money. Service was secured by publication and service in state "B". Judgment was secured in state "A". In an opinion prepared by Mr. Justice Holmes it was held that state "B" had to give full faith and credit to the judgment because state "A" had continuing jurisdiction of the probate proceeding. Even though state "A" had lost physical power over the administrator, its jurisdiction to bind him by the order requiring him to repay the million dollars continued, 228 U.S. at page 353, 33 S.Ct. at page 552, as "one of the decencies of civilization that no one would dispute." See, also, *Nations v. Johnson*, 24 How. 195, 65 U.S. 195, 16 L.Ed. 628; *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S.W. 100; *Elasser v. Haines*, 52 N.J.L. 10, 18 A. 1095.

California has expressly adopted this continuing jurisdiction concept and has applied it to divorce as a proceeding continuing after the final decree and as encompassing support and custody modifications. Thus, in *Reynolds v. Reynolds*, 21 Cal.2d 580, 134 P.2d 251, the rule of the Michigan Trust Co. case was expressly followed in holding that where a party in a prior divorce action leaves the state and has counsel of record, valid service may be made upon his attorneys of an order to show cause to raise child support payments. See, also, *Russ v. Russ*, 68 Cal.App. 2d 400, 156 P.2d 767; *Moore v. Superior Court*, 203 Cal. 238, 263 P. 1009; *Benway v. Benway*, 69 Cal.App.2d 574, 159 P.2d 682; *Foy v. Foy*, 23 Cal.App.2d 543, 73 P.2d 618.

Respondent contents himself on this phase of the argument by citing *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 and *De La Montanya v. De La Montanya*, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, contending that such cases require personal service within the state. Those cases did not discuss, because they did not involve, the continuing jurisdiction concept. Moreover, recent decisions have cut deeply into the outmoded concept that jurisdiction in personal actions is solely dependent on physical power to enforce the court's process and have recognized the need of a state to keep jurisdiction over those departing from its jurisdiction in this day and age of mobile populations. See cases collected and discussed in *Allen v. Superior Court*, 41 Cal.2d 306, 259 P.2d 905.

This continuing jurisdiction concept definitely establishes that the custody modification action and the instant show cause proceedings are part and parcel of the original continuing divorce action. If this were not a contempt proceeding the rule of these cases would obviously establish that jurisdiction over respondent was properly secured by service upon his counsel.

But this is a contempt proceeding, and respondent contends that by statute California has determined that service upon counsel of a party is not permitted in such proceedings. The statutes relied upon are

sections 1015 and 1016 of the Code of Civil Procedure. They provide:

Sec. 1015: "When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the judge where there is no clerk, for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt * * *."

Sec. 1016: "The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt."

Respondent contends that, whatever the rule may be in other types of cases, these sections preclude substituted service upon counsel in contempt proceedings. There is some general language in a couple of cases so holding. *Johnson v. Superior Court*, 63 Cal. 578; *In re Meyer*, 131 Cal. App. 41, 20 P.2d 732. But it is also well settled that these sections do not create an absolute prohibition against substituted service in contempt proceedings. One of the leading cases modifying the seemingly absolute terms of these sections is *Shibley v. Superior Court*, 202 Cal. 738, 262 P. 332. There, in a separate maintenance action, service of an order to show cause in a contempt proceeding based on a refusal to pay alimony *pendente lite* was made upon the attorney. The service was upheld as valid. The court noted that the following conditions warranted substituted service in that case: (1) The defendant was absent from California and could not be found; (2) defendant was a resident of California; and (3) defendant was represented by counsel in this state who were actively representing him. The court finds justification for substituted service in such a case by reliance upon the well-settled rule that where a party conceals himself in California to avoid service of a contempt citation, substituted service upon his attorney may be had. *Foley v. Foley*, 120 Cal. 33, 52 P.

122; *Golden Gate Con. H. M. Co. v. Superior Ct.*, 65 Cal. 187, 3 P. 628; *Eureka Lake & Yuba Canal Co. v. Superior Ct.*, 66 Cal. 311, 5 P. 490, affirmed 116 U.S. 410, 6 S.Ct. 429, 29 L.Ed. 671. These concealments within the state cases are predicated upon the theory that every court possesses inherent jurisdiction to punish for contempt, under the code sections quoted earlier in this opinion conferring upon courts the power to punish for contempt, and that such jurisdiction cannot be defeated by the party concealing himself to avoid service.

The doctrine of the Shibley case has been followed in this state *Olcott v. Superior Court*, 68 Cal.App.2d 603, 157 P. 36—where defendant was out of the state—*Moore v. Superior Court*, 203 Cal. 238, 263 P. 1009.

The Shibley case is analogous to the instant one except in one respect. There, the defendant was a resident of California and left this state to avoid service. Here, the defendant, after the original divorce proceedings, left California and has become a resident of Utah. It is averred that he is concealing himself in Utah to avoid service. This distinction, while important, is not necessarily controlling. The fundamental concept behind the so-called concealment cases is that a party cannot defeat the jurisdiction of the courts by hiding out and evading service. That concept applies whether or not the guilty party is a resident of California or of some other state, and whether he conceals himself within or without this state. *Olcott v. Superior Court*, 68 Cal.App.2d 603, 157 P.2d 36.

The Shibley case contains another holding that is directly applicable here. As an additional ground for upholding the service upon counsel in that case the court pointed out that defendant there had actual notice of the order forming the basis of the contempt proceeding and that defendant had left the state to evade the service of that order. The court held, 202 Cal. at page 741, 262 P. at page 333: "Under such circumstances service of a copy of said order would not be required in order to put the defendant in contempt for a violation of its provisions nor to lay the foundation for

the issuance by the trial court of the subsequent order to show cause why the defendant should not be cited and punished for such contempt."

[10] This reasoning applies to the facts here involved. Respondent knew that the appeal from the custody order operated as a stay, so as to continue custody of the children in the mother. He knew this because under oath he so averred in his petition to this court for a change of custody pending appeal. With this knowledge respondent kidnapped and has secreted the children, and has concealed himself. Under the rule of the Shibley case he knew that he was then violating the statutory stay and is bound by service upon his attorneys.

The Shibley case does not stand alone on this proposition. While it is well settled that some notification of an order is needed as the prerequisite for a valid contempt adjudication, *In re Saunders*, 76 Cal.App.2d 635, 173 P.2d 818; *Ruppe v. Superior Court*, 127 Cal.App. 118, 15 P.2d 197; *Bryant v. Superior Court*, 30 Cal.App.2d 509, 86 P.2d 837, there are several other cases holding that notification of pending proceedings need not be formal notification, and that actual knowledge of the same may be sufficient. *MacPherson v. MacPherson*, 13 Cal.2d 271, 89 P.2d 382; *Romine v. Cralle*, 83 Cal. 432, 23 P. 525; *In re Ellery*, 22 Cal.App.2d 274, 70 P.2d 690; *Young v. Superior Court*, 69 Cal.App. 281, 231 P. 347; *Mattos v. Superior Court*, 30 Cal.App.2d 641, 86 P.2d 1056; *People v. Saffell*, 74 Cal.App.2d Supp. 967, 168 P.2d 497.

For these many reasons it is therefore held that personal jurisdiction was properly secured over the respondent by service upon his counsel.

[11] Appellant also requests an allowance of attorney fees for the prosecution of the present proceeding, and an allowance for future fees that may be incurred in the enforcement of this contempt proceeding. Affidavits have been filed alleging appellant's need, and lack of funds, and respondent's ability to pay. Respondent's counsel have declined the opportunity of filing counter-affidavits. We find that ap-

pellant is in need of funds, and that respondent is able to pay. We think that a fee of \$350 for services to date is reasonable. It is impractical to fix future fees at the present time. The court will retain jurisdiction to fix, if necessary, future fees, and to make an award of costs.

The court finds that respondent, Walter G. Smith, is guilty of the misdemeanor of contempt of this court in that he has committed acts in violation of subdivisions 4 and 5 of section 166 of the Penal Code, and of subdivisions 5 and 8 of section 1209 of the Code of Civil Procedure. For such violation, it is ordered, adjudged and decreed that the respondent be taken into custody and remanded to the Sheriff of the County of Contra Costa, California, and that he be punished by imprisonment in the county jail of the County of Contra Costa, State of California, for one day.

It is further found by this court that it is now and will continue to be within the power of respondent to return the children Amanda and Eric Smith to California and to the custody of appellant or to the juvenile authorities of Contra Costa County. It is therefore ordered that respondent shall

continue to be imprisoned after the expiration of the one-day period until he shall have returned the children Amanda and Eric Smith to the custody of their mother, the appellant Barbara R. Smith, or, in the alternative, to the physical custody of the Probation Officer of the County of Contra Costa, to await the further order of this court.

The Sheriff of the County of Contra Costa is commanded and directed to take the respondent into custody and to imprison him in accordance with terms of this order.

It is further ordered that appellant is awarded \$350 as and for attorney fees for services to date. Because of the unknown nature and extent of future services, it is impractical to now fix future fees, and the court reserves jurisdiction to make such future award when the nature and extent of the services can be ascertained. At that time the court will also consider the request for an allowance for costs incidental to this proceeding.

BRAY and FRED B. WOOD, JJ., concur.

41 Cal.2d 567

**SAFeway STORES, Inc. v. RETAIL
CLERKS INTERNATIONAL
ASS'N et al.
S. F. 18481.**

Supreme Court of California.
In Bank.

Oct. 16, 1953.

Action by owner and operator of retail food stores located throughout the United States to enjoin strike activities of union seeking recognition as bargaining agents for local store managers. The Superior Court, Alameda County, Ralph E. Hoyt, J., issued preliminary injunction, and unions appealed. The Supreme Court, Shenk, J., held that unions' activities in seeking recognition for local retail store managers, who were supervisory employees, were not reasonably related to any legitimate interest of organized labor, were not in furtherance of any proper labor objective, and, as a matter of sound public policy, were enjoinable within equity jurisdiction of the court.

Judgment affirmed.

Carter and Traynor, JJ., dissented.

Prior opinion, 234 P.2d 678.

1. Labor Relations — 176, 837

Exclusion of supervisory employees and of regulation of their collective bargaining rights from Labor Management Relations Act of 1947, left such field open to state control, and, therefore, state court had jurisdiction, in injunction action arising from union's attempt to be recognized as bargaining agents for local retail store managers, even though National Labor Relations Board had not determined that store managers were supervisors, and state court had jurisdiction to determine facts upon which its jurisdiction would depend. National Labor Relations Act, §§ 1 et seq., 2(3, 11) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 152(3, 11).

2. Labor Relations — 946

In action by owner and operator of retail food stores located throughout United States to enjoin strike activities of union

seeking recognition as bargaining agents for local store managers, evidence was sufficient to establish that store managers were supervisors within Labor Management Relations Act of 1947. National Labor Relations Act, §§ 1 et seq., 2(3, 11) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 152(3, 11).

3. Labor Relations — 176

The Labor Management Relations Act of 1947 neither enlarges nor limits existing fundamental right of supervisors but removes them from classification of employees under federal and state acts regulating exercise of employees' collective bargaining rights and inhibits compulsion on employer engaged in interstate commerce to include supervisors as employees for purpose of such acts. National Labor Relations Act, §§ 1 et seq., 2(3, 11) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 152(3, 11).

4. Labor Relations — 176, 192

Right of self-organization and selection of bargaining representative, together with union organization for conduct of collective bargaining and traditional peaceful strike for higher wages, are rights which exist independently of labor relations acts, and it was regulation of such fundamental right of labor supervisory personnel, formerly included within the National Labor Relations Act, that the Labor Management Relations Act of 1947 left to the states for separate classification and regulation. National Labor Relations Act, §§ 1 et seq., 2(3, 11) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 152(3, 11).

5. Labor Relations — 828

Concerted union activity for an objective which is not reasonably related to any legitimate interest of organized labor will be enjoined.

6. Constitutional Law — 70(3)

Questions of public policy are primarily for legislative department to determine, but, when neither constitution nor legislature has spoken on the subject, courts may make the declaration.

7. Labor Relations ⇨96

Local retail store managers, when acting as agents of management, owed undivided loyalty to their employer, and, therefore, it was eminently proper that such management supervisors be kept free from divided loyalty that would be engendered by compulsory membership in local unions. National Labor Relations Act, §§ 1 et seq., 2(3, 11) as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 152(3, 11).

8. Labor Relations ⇨367

An employer may not demand that his representative sit in the inner councils of labor and thus be placed in position of exerting his influence in directing labor's policies and activities.

9. Labor Relations ⇨837

Unions' activities in seeking recognition for local retail store managers, who were supervisory employees, were not reasonably related to any legitimate interest of organized labor, were not in furtherance of any proper labor objective, and, as a matter of sound public policy, were enjoined within equity jurisdiction of the court. National Labor Relations Act, §§ 1 et seq., 2(3, 11), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. §§ 151 et seq., 152(3, 11).

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Roland C. Davis, J. D. Burdick, Carroll, Davis & Freidenrich, San Francisco, amici curiæ on behalf of appellants.

Mitchell T. Neff, Willard S. Johnston, B. H. Parkinson, Jr., Orrick, Dahlquist, Herington & Sutcliffe, San Francisco, John B. Rosson, Oakland, Brown, Rosson & Berry and Edward E. Mitchell, San Francisco, for respondent.

Iddings, Jeffrey, Weisman & Rogers, Dayton, Ohio, and Pillsbury, Madison and Sutro, San Francisco, amici curiæ on behalf of respondent.

SHENK, Justice.

This is an action to enjoin strike activities of the defendant unions. A preliminary injunction issued. The defendants have appealed.

The controversy leading to the commencement of the action arose after the enactment of the Labor Management Relations Act in 1947, 61 Stats. 136, sec. 101, amending the National Labor Relations Act of 1935, 29 U.S.C.A. §§ 151-167, and removing supervisors from the classification of employees as defined in the act. The problem concerns the effect of the Labor Management Relations Act on the right of the defendant local unions to recognition as the bargaining agents for the plaintiff's local store managers for the purpose of coercing the inclusion of store managers in the retail clerks' collective bargaining contract with the employer.

The plaintiff, herein referred to as Safeway, is a corporation engaged in the business of owning and operating retail food stores throughout the United States. For the purposes of this case it is engaged in interstate commerce. The defendants are the Retail Clerks International Association, an unincorporated association, the affiliated state association, and the local clerks' unions of Alameda and Contra Costa counties in this state.

Seventy-six of Safeway's stores are located in the counties mentioned. In each store a manager and from four to twenty-three clerks and butchers are employed. Each store stocks some 1800 different food and household items and daily sales run from \$700 to \$3,000. The clerks belong to their retail clerks local unions. The butchers belong to their separate union. In addition other employees, such as deliverymen, belong to their own union. Each store is separate geographically from the others and each has its individual store manager.

Beginning in 1937 and until September 19, 1949, clerks and store managers were members of the defendant local unions under current labor contracts. It is assumed that prior to the present controversy the unions were the certified bargaining rep-

representatives of the store managers and clerks under the National Labor Relations Act. Before the expiration of the last contract on the above date in 1949 certain wage increases were demanded. During the course of the negotiations the plaintiff announced that local store managers would no longer be included in the labor contract. On September 19, 1949, one of the defendant local unions instituted a strike and began picketing. Wage increases for store managers and clerks were settled on October 19th and were put into effect by Safeway on October 26th. Upon the refusal of Safeway to include store managers in the contract or to recognize the clerks' unions as the representatives of the store managers, the other union then struck. The strike and picketing continued until the commencement of this action in November 1949. A hearing on the order to show cause was had on the verified complaint, numerous affidavits, and oral testimony. It consumed seventy-six court days and resulted in the issuance of the preliminary injunction on March 22, 1950.

As material here the trial court's order enjoined the defendants from engaging in concerted activities to induce or compel the plaintiff to require union membership of its store managers in the local unions or to bargain to that end with the store managers or with the unions on their behalf. These provisions of the order are based on the facts disclosed at the hearing and the conclusions of the court drawn therefrom that the store managers are supervisors within the meaning of the Labor Management Relations Act of 1947. The propriety of that conclusion and of the action of the trial court on the record are the questions presented.

There are, of course, no findings as such at this stage of the proceeding. They follow appropriately after the trial of the action. The facts, for present purposes, are disclosed by the allegations of the verified complaint, the averments of numerous affidavits, other documentary evidence, and the oral testimony. It was for the trial court to resolve any conflicts in the evidence.

In the opinion of the trial court which has been made a part of the record, Rule 5(a) of Rules on Appeal, it is stated: (1) that the store managers (referred to generally by the plaintiff as location managers, and by the defendants as managing clerks), are supervisory employees who act as agents of management entrusted with the formulation and execution on behalf of management of substantial matters involving judgment and policy; (2) that no issue was presented concerning the wages, hours or working conditions of the clerks or the store managers; (3) that the object of the strike was to compel Safeway to bargain and contract with the clerks' union concerning membership of its store managers in the defendant local unions; (4) that the strike was not a jurisdictional strike as contended by Safeway and as denounced by section 1118 of the Labor Code of this state; (5) that the by-laws of the local unions provide that "only members not having the right to hire or fire shall be eligible to, or shall hold, office"; that "any member who is guilty of improper conduct * * * shall be fined, suspended or expelled"; (6) that the executive boards of the two local unions are vested with the "power to * * * discipline any member by fine, removal from employment or other penalty * * * for conduct which tends to undermine the purposes for which the union is formed"; (7) that the constitution of the Retail Clerks' International Association contains substantially the same provisions and in addition provides that "it shall be the duty of members of every local union individually and collectively to do all in their power to advance the cause of organized labor * * *"; (8) that each store manager has the final decision as to whether clerks shall be employed to work or shall continue to work in the store of which he is manager; (9) that violence, intimidation and coercion on the part of pickets of defendant local unions have occurred in such a way as to indicate their recurrence unless restrained by an appropriate order; (10) that the purpose of the picketing is to further an objective which is contrary to the public policy of the state

and therefore unlawful; and (11) that the plaintiff is suffering serious damage as a result of the defendants' activities. There is an abundance of evidence to support the foregoing statements of fact and conclusions.

It is contended by the defendants that the trial court had no jurisdiction to act on the subject matter of the complaint and that exclusive jurisdiction was vested in the National Labor Relations Board. The history of the federal legislation on the subject may be resorted to in considering the effect of the changes in the law. It may be assumed that before the enactments of 1947 the subject matter of the controversy was within the exclusive jurisdiction of the National Labor Relations Board. But the changes compel an opposite conclusion.

Section 2(3) of the act of 1947 excludes from the definition of "employee" "any individual employed as a supervisor". Section 2(11) states that "the term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The evidence is overwhelming to the effect that the local store managers have authority in the interest of their employer to direct the activities of employees under their supervision, to effectively make recommendations in disciplinary matters and to hire and discharge the clerks. Both sides concede that store managers perform the duties of clerks when necessary or in their spare time. The record, however, supports the conclusion that the store managers act as agents of management in substantial and important matters of judgment and policy. The inclusion of detailed evidentiary matter in this respect is unnecessary in view of decisions of the National Labor Relations Board in similar cases that such store managers are supervisors. *National Tea Co.*, 89 N.L.R.B. No. 148, N.L.R.B. Deci-

sions (CCH), par. 9922, 1950; *Re Safeway Stores, Inc.*, 59 N.L.R.B. 936, 938 (1944). In November 1949, in related cases involving Safeway in neighboring counties the National Labor Relations Board ordered the clerks' unions not to bargain collectively with Safeway by demanding as a condition the inclusion of store managers. That order implies a holding that the store managers are supervisors. In *Ohio Power Co. v. N. L. R. B.*, 6 Cir., 1949, 176 F.2d 385, 388, 11 A.L.R.2d 243, it was said that § 2(11) covers any individual having authority responsibly to direct; that it "does not require the exercise of the power described for all or any definite part of the employee's time. It is the existence of the power which determines the classification." In that case the court ordered that the Board's certification of representatives entered prior to the effective date of the Labor Management Relations Act be set aside to the extent that supervisory employees involved were included in the unit, and that the certification be amended to exclude them from the unit.

[1,2] By the exclusion of supervisory employees and the regulation of their collective bargaining rights from the federal act the field as to them was left open to state control. *Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S. Ct. 820, 86 L.Ed. 1154; cf. *Gerry of California v. Superior Court*, 32 Cal.2d 119, 194 P.2d 689. Therefore, the contention that the state court has no jurisdiction until the National Labor Relations Board in the first instance determines that store managers are supervisors is without merit; and since the state court can act, it has the jurisdiction to determine the facts upon which its jurisdiction depends. *Rescue Army v. Municipal Court*, 28 Cal.2d 460, 464, 171 P.2d 8; appeal dismissed 331 U.S. 549, 67 S.Ct. 1409, 91 L.Ed. 1666. In the present case the jurisdictional fact that store managers are supervisors has been determined with evidentiary support adversely to the defendants' contention.

The question then is as to the rights of the clerks' unions under state law to en-

gage in concerted activities against Safeway for the purpose of requiring store managers to be included in the labor contract of the clerks.

[3] The federal amendatory act neither enlarges nor limits the existing fundamental rights of supervisors. What it does is to unclassify supervisors as employees under federal and state acts regulating the exercise of employees' collective bargaining rights, coupled with the inhibition against compulsions on the employer engaged in interstate commerce to include supervisors as employees for the purpose of such acts.

[4] The decisional and other authorities define existing fundamental labor rights. The right of self-organization and of selection of a bargaining representative are rights which exist independently of labor relations acts. The existing right includes union organization for the conduct of collective bargaining and the traditional peaceful strike for higher wages. See Torts, Restatement § 784. It was characterized and recognized as a fundamental right long before it was protected under the National Labor Relations Act and similar state acts. *International Union, U.A.W.A.F. of L., Local 232 v. Wisconsin Empl. Rel. Bd.*, 336 U.S. 245, 259, 69 S.Ct. 516, 93 L.Ed. 651; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, supra, 301 U.S. 1, 33, 57 S.Ct. 615, 81 L.Ed. 393; see also *International Union etc. v. O'Brien*, 339 U.S. 454, 457, 70 S.Ct. 781, 94 L.Ed. 978. It was the regulation of this fundamental right of the labor supervisory personnel formerly included within the federal act that the 1947 amendatory provisions left to the states for separate classification and regulation.

[5] It is undisputed that concerted union activity for an objective which is not reasonably related to any legitimate interest of organized labor will be enjoined. It was said in *James v. Marinship Corporation*, 25 Cal.2d 721, at page 728, 155 P.2d 329, at page 333, 160 A.L.R. 900: "It should be recognized at the outset that a union may use the various forms of con-

certed action * * * to enforce an objective that is reasonably related to any legitimate interest of organized labor. (Citing cases.) It is equally well settled that the object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief." In that case the plaintiff employees successfully sought the exercise of the equity powers of the court to control the activities of fellow employees and management contrary to the rights of the plaintiffs. Those rights were not protected or controlled by any statutory regulation. So here the equity jurisdiction of the court was invoked by the plaintiff to be protected against unjustifiable coercion on the part of one group of its employees concerning a matter which also was not the subject of any statutory regulation or control and was contrary to the rights of the plaintiff.

[6] The trial court concluded that the union activity was contrary to public policy and therefore unlawful. One of the questions presented is whether it has appropriately done so. It is true that questions of public policy are primarily for the legislative department to determine. But it is also true that when neither the constitution nor the legislature has spoken on the subject the courts may make the declaration.

In cases without number the state courts have declared contracts, transactions and activities of individuals, associations and corporations to be contrary to public policy where their legislative departments have not spoken on the subject.

One of the latest restatements of the rule is by the Supreme Court of the United States in *Building Service Emp. Intern. Union Local 262 v. Gazzam*, 1949, 339 U.S. 532, at page 536, 70 S.Ct. 784, at page 787, 94 L.Ed. 1045, where it was said: "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily it is for the lawmakers to determine the public policy of the state.' *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357, 51 S.Ct. 476, 478, 75 L.Ed. 1112."

This court has within recent years declared the public policy of the state within the particular field here involved. *James v. Marinship Corp.*, supra, 1944, 25 Cal.2d 721, 155 P.2d 329; *Hughes v. Superior Court*, 1948, 32 Cal.2d 850, 198 P.2d 885, affirmed 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985.

The term "public policy" is inherently not subject to precise definition. In *Maryland Casualty Co. v. Fidelity & Casualty Co.*, 71 Cal.App. 492, at page 497, 236 P. 210, 212, the court stated: "The question, what is public policy in a given case, is as broad as the question of what is fraud." Also in *Noble v. City of Palo Alto*, 89 Cal.App. 47, at pages 50-51, 264 P. 529, at page 530, the court said: "Public policy is a vague expression, and few cases can arise in which its application may not be disputed. Mr. Story, in his work on Contracts (section 546), says: 'It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud.' By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good * * *. Public Policy means * * * anything which tends to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against public policy. * * *"

[7,8] Since on this record store managers are agents of management when so acting they owe undivided loyalty to their principal. As members of the defendant unions they would under union rules be in duty bound to advance the cause of the community of interest of store managers and clerks in any dispute or disagreement with their principal. They would be under constant apprehension of the penalties under union rules, such as fines, suspension, or expulsion. It is eminently proper that management supervisors, the store managers in this case, be kept free from the divided loyalty that would be engendered by compulsory membership in the defendant local unions. Under the law an employer may

not demand that his representatives sit in the inner councils of labor and thus be placed in the position of exerting his influence in directing labor's policies and activities. If such an objective were recognized and were accomplished collective bargaining would be in confusion and indeed futile. By the same token an employee union may not insist that a representative of the employer be required to participate in its deliberations under union rules and thus divide his loyalty.

[9] Confronted with the responsibility of declaration where as here there is no constitutional or legislative guide on the subject we hold that the trial court was correct in deciding that the coercion sought to be exercised by the defendants under the circumstances of this case was not reasonably related to any legitimate interest of organized labor; that the activities of the defendants were not in the furtherance of any proper labor objective, and that as a matter of sound public policy were enjoined within the equity jurisdiction of the court.

The judgment is affirmed.

EDMONDS, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority holds that the federal law (Labor Management Relations Act) has no bearing on this case and that the question is one of state law. With that I agree.

The sole question, as put by the majority opinion, is whether the public policy of this state forbids the representation in collective bargaining of supervisory employees by a union composed of the rank and file employees. The majority opinion holds that public policy does prohibit such representation, and, as a corollary thereof, that concerted activity by the union to compel such representation is for an unlawful object and therefore enjoined. I am not concerned with the latter question because I do not believe such representation is against the public policy of this state.

Indeed, the public policy as expressed by the Legislature is directly to the contrary. The statute states:

"[T]he public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have *full freedom of association*, self-organization, and *designation of representatives of his own choosing*, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Emphasis added, Labor Code, § 923. Thus an employee shall have the right to bargain collectively through a representative of his own choosing. Here the rank and file union is the representative chosen by the store managers and to hold that they may not choose such representative is contrary to section 923, *supra*. There is no qualification on the term "employee" in section 923. Therefore it embraces supervisory as well as nonsupervisory employees. It has been held that a mine superintendent is an employee within the meaning of the labor laws, *Davis v. Morris*, 37 Cal.App.2d 269, 99 P.2d 345, and it has been held repeatedly that supervisory employees came within the term "employees" under the National Labor Relations Act until it was amended in 1947 to expressly exclude them from the term. *L. A. Young Spring & Wire Corp. v. National Labor Relations Bd.*, 82 U.S.App.D.C. 327, 163 F.2d 905; *National Labor Relations Board v. Swift & Co.*, 3 Cir., 162 F.2d 575; *Wells, Inc. v.*

National Labor Relations Board, 9 Cir., 162 F.2d 457; *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, 67 S.Ct. 789, 791, 91 L.Ed. 1040. In the *Packard* case, it was held that supervisory employees were within the term "employee" used in the National Labor Relations Act and hence entitled to the benefits of the Act, that is, to have the employer bargain collectively with an association formed to represent them in such bargaining, the Court stating:

"The point that these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term, is too obvious to be labored. The Company, however, turns to the Act's definition of employer, which it contends reads foremen out of the employee class and into the class of employers. Section 2(2) reads: 'The term "employer" includes any person acting in the interest of an employer, directly or indirectly * * *.' 49 Stat. 450. The context of the Act, we think, *leaves no room for a construction of this section to deny the organizational privilege to employees because they act in the interest of an employer. Every employee, from the very fact of employment in the master's business, is required to act in his interest. He owes to the employer faithful performance of service in his interest, the protection of the employer's property in his custody or control, and all employees may, as to third parties, act in the interests of the employer to such an extent that he is liable for their wrongful acts. * * **

"*Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others. * * **

"*The company's argument is really addressed to the undesirability of permitting*

foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of *their fellow foremen*, rather than by the company's interest. There is nothing new in this argument. It is rooted in the *misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work.* But the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms.

"Moreover, *the company concedes that foremen have a right to organize. What it denies is that the statute compels it to recognize the union.* In other words, it wants to be free to fight the foremen's union in the way that companies fought other unions before the Labor Act. But there is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization than by individual competition. * * *

"It is also urged upon us most seriously that unionization of foremen is from many points bad industrial policy, that *it puts the union foreman in the position of serving two masters, divides his loyalty and makes generally for bad relations between management and labor. However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions.*" Emphasis added; *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, 488-493, 67 S.Ct. 789.

Likewise in the present case, section 923, *supra*, by the use of the term "employee" without qualification includes supervisory employees, namely, the store managers, and the Legislature has declared that such em-

ployees shall have the right to bargain collectively with a representative of their own choosing. Hence they may choose the rank and file union as their representative. The Legislature has so declared and this Court is not authorized to declare a contrary policy as does the majority here.

It may be suggested that the managers are entitled to form their own union separate from the rank and file union and have it represent them in bargaining, but they cannot, as here, have the rank and file union as their representative. The majority opinion does not discuss this question but the clear implication is that it would be unlawful for a union of managers to bring concerted action to compel the employer to bargain with it. In the first place, there is no such limitation in section 923, *supra*. It is left solely to the supervisory employees to decide who shall represent them and that includes either a managers' union or rank and file union.

In regard to a distinction, if any, between the right to bargain through a managers' union or a rank and file union, the majority opinion in summarizing its holding, states: "Since on this record store managers are agents of management when so acting they owe undivided loyalty to their principal. As members of the defendant unions they would under union rules be in duty bound to advance the cause of the community of interest of store managers and clerks in any dispute or disagreement with their principal. They would be under constant apprehension of the penalties under union rules, such as fines, suspension, or expulsion. It is eminently proper that management supervisors, the store managers in this case, be kept free from the divided loyalty that would be engendered by *compulsory membership* in the defendant local unions. Under the law an employer may not demand that his representatives sit in the inner councils of labor and thus be placed in the position of exerting his influence in directing labor's policies and activities. If such an objective were recognized and were accomplished collective bargaining would be in confusion and indeed futile." The same arguments there made would apply regardless of

whether a rank and file union or managers' union was the representative of the managers because the latter union would have its rules and threats of suspension for any member who was not loyal to the union's cause of obtaining the best terms of employment possible for its members. Its interests would conflict with the employer's interests the same as the interests of a rank and file union. It should be observed that the majority opinion refers to the "compulsory membership" of the managers in the rank and file union. As far as appears, the managers are not being compelled to belong to the rank and file union and have it as their representative. They are willing and want to join such union and have such representation.

This brings us to the question of whether there is or should be any public policy against the formation and use, as a bargaining representative, of a union by the managers alone. From what I have stated above, it clearly appears that the policy, as stated by the Legislature Labor Code, § 923, *supra*, authorizes such representation. Aside from the Legislature's declaration, however, it should be clear that the policy favors such representation. The soundness of that proposition is demonstrated by the decision in *Packard Motor Car Co. v. Labor Board*, 330 U.S. 485, 67 S.Ct. 789, quoted *supra*. Moreover, such representation is not new in the law. In the newspaper and jobprinting field, foremen have been members of the rank and file unions since 1889. See 55 Yale L.J. 772. The same is true in other industries such as building trades, metal trades, and railroads. *Collective Bargaining by Foremen*, 12 Labor Relations Reporter, 421, May, 1943, Bureau of National Affairs. In *N. L. R. B. v. Edward G. Budd Mfg. Co.*, 6 Cir., 169 F.2d 571, 577, certiorari denied *Foreman's Ass'n of America v. Edward G. Budd Mfg. Co.*, 335 U.S. 908, 69 S.Ct. 411, 93 L.Ed. 441, the Court in discussing the claim that the Labor Management Relations Act (1947 amendment) was unconstitutional as to foremen because they were excluded from its protection, held the Act constitutional but said: "The right of employees to form labor organizations and

to bargain collectively through representatives of their own choosing with employers has long been recognized. *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 33, 34, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352."

I would, therefore, reverse the judgment.

TRAYNOR, J., concurs.

Rehearing denied; GIBSON, C. J., CARTER and TRAYNOR, JJ., dissenting.



41 Cal.2d 563

DAVIS v. DAVIS.

L. A. 22376.

Supreme Court of California.

Oct. 16, 1953.

Proceeding by divorced husband against former wife for modification of divorce decree awarding custody of minor to mother. The Superior Court, Kern County, William L. Bradshaw, J., entered order awarding father custody and mother appealed. The District Court of Appeal, 253 P.2d 506 reversed order and husband appealed. The Supreme Court, Shenk, J., held that where wife, after divorce from plaintiff had remarried, divorce proceedings against wife's present husband were pending, wife was contemplating marriage to a fourth husband, wife showed little concern about child being under physician's care, and wife was currently unemployed, modification of custody provision was not abuse of discretion.

Order affirmed.

1. Divorce ⇐303(3)

As between parents, generally written findings of fact are not essential to sustain order modifying decree of divorce by changing order relative to custody of minor children.

2. Parent and Child ⇐2(2)

In a contest between parents concerning custody of their minor child, neither is entitled to custody as a matter of right. Civ.Code, § 138(2).

3. Infants ~~C~~19

The court has broad discretion in matters pertaining to change of custody of children, but to warrant modification of custodial order, there must be substantial evidence of a change of circumstances after entry of original decree.

4. Divorce ~~C~~303(3)

Where same trial judge presided at divorce trial and at subsequent proceedings for modification of custody provision of divorce decree judge must be deemed to have been familiar with circumstances existing at time of divorce trial and subsequent hearing and judge could take all of this evidence into consideration as a basis for comparison.

5. Divorce ~~C~~303(3)

Where wife, after divorce from husband, remarried, divorce proceedings against wife's present husband were pending, wife was contemplating marriage to a fourth husband, wife showed little concern about minor child being sick and under physician's care and wife was currently unemployed, modification of custody provision of divorce decree, awarding custody to former husband, was not abuse of discretion.

Siemon & Siemon, Bakersfield, for appellant.

Kenneth N. Hastin, Bakersfield, for respondent.

SHENK, Justice.

In this supplementary proceeding in a divorce action the plaintiff, Ralph C. Davis, applied for a modification of the provision of the divorce decree which awarded to the mother, Eleanor May Davis, the custody of their five year old daughter, Patricia Diana Davis. Pursuant to the application the trial court awarded the custody of the daughter to the father. The mother appeals from the order.

The decree of divorce was granted to the defendant on her cross-complaint. The interlocutory decree was entered on April 3, 1947, and the final decree on April 7, 1948. As above noted the custody of the daugh-

ter was awarded to the mother. Following a hearing on March 14, 1950, on the plaintiff's application, the court modified the decree with respect to visitation rights but continued the matter for further hearing to June 20 1950, when evidence was taken and the decree was again modified with respect to those rights. The matter was then continued to December 19, 1950, when it was postponed indefinitely. On December 28, 1951, on application of the plaintiff supported by affidavit, the court issued an order requiring the defendant to show cause why she should not be held in contempt for violating court orders and why the custody provisions of the divorce decree should not be modified by awarding custody of the daughter to the plaintiff.

The application was made on the ground that the defendant had violated the visitation rights of the plaintiff and that under conditions obtaining since the original order of custody was made it was for the best interests of the child to transfer custody to the plaintiff. The appeal is presented on a settled statement. There was no adjudication of contempt. The custodial order was changed without making any findings or recitation of facts upon which it was based.

[1] As between parents "it is the general rule that written findings of fact are not essential to sustain an order modifying a decree of divorce by changing the order relative to the custody of minor children." *Smith v. Smith*, 85 Cal.App.2d 428, 433, 193 P.2d 56, 58; see also *Stever v. Stever*, 6 Cal.2d 166, 56 P.2d 1229; *Exley v. Exley*, 101 Cal.App.2d 831, 225 P.2d 662; *Gavel v. Gavel*, 123 Cal.App. 589, 11 P.2d 654; *Simmons v. Simmons*, 22 Cal.App. 448, 134 P. 791.

[2] In a contest between parents concerning the custody of their minor child neither is entitled to custody as a matter of right. Under the statute, Civ.Code, § 138 (2), each is equally entitled to custody and no showing or finding of unfitness is necessary to enable the court to award custody to one or the other in accordance with what, in its sound discretion, is deemed the best interests of the child. *Munson*

v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268; Stever v. Stever, supra, 6 Cal.2d 166, 169, 56 P.2d 1229; Beal v. Beal, 218 Cal. 755, 758, 24 P.2d 768. It is therefore assumed that each parent in this case was deemed by the court to be a fit and proper person to have custody of Patricia. It is also assumed that the modification was ordered in view of conditions presently existing which, in the judgment of the court, were more favorable to the child's welfare than those present at the time the custodial order was made in the original divorce decree.

[3] The court has broad discretion in matters pertaining to the change of custody of children. However, it is the general rule that to warrant the modification of a custodial order there must be substantial evidence of a change of circumstances after the entry of the original decree. *Gantner v. Gantner*, 39 Cal.2d 272, 246 P.2d 923; see also *Prouty v. Prouty*, 16 Cal.2d 190, 105 P.2d 295. It is the position of the defendant that the order here under review lacks sufficient evidentiary support and that the court abused its discretion in making the change of custody.

[4] In examining the evidence it is noted that the same trial judge presided at the divorce trial and at the subsequent modification proceedings. He must therefore be deemed to have been familiar with the circumstances existing at the time of the divorce trial and subsequent hearings. He could take all of this evidence into consideration as a basis for comparison. *Gantner v. Gantner*, supra, 39 Cal.2d at pages 276-77, 246 P.2d 923.

[5] In support of the order the evidence shows that after her divorce from the plaintiff the defendant had remarried; that proceedings to divorce her present husband, White, were pending; that she was contemplating marriage to a fourth husband, a man residing in Nevada, as soon as her divorce from White should become final; that in October, 1951, she suddenly decided to go to Nevada with friends by automobile in order to visit her prospective husband and stayed there for more than a week; that she left Patricia and her three

children by other marriages in the care of a practical nurse; that she had never before met this nurse, became known to her through a newspaper advertisement, and apparently made no attempt to investigate her qualifications; that on the day the defendant left for Nevada Patricia was suffering from a cold; that while she was in Nevada the plaintiff went to the defendant's home on a day designated by a court order to take possession of Patricia; that he found her and the other children under the care of the nurse who was having difficulty in properly administering to the needs of Patricia; that the plaintiff took the child to Bakersfield where he arranged for medical treatment; that upon the defendant's return from Nevada he informed her by telephone that he had Patricia under a doctor's care, and that the defendant showed little concern about the sick child, and that at this time the child remained with the plaintiff for five weeks.

The defendant testified that she was unemployed; that she had been working at hotels as a regular waitress in the evening and at other times as a cocktail waitress, and that when she was employed away from home she left her children with her mother.

The plaintiff alleged unfitness on the part of the defendant to further have custody of the child. Under the circumstances there was no necessity for the trial court to make a finding on this point.

The record is sufficient to support the conclusion that the defendant's subsequent marital status, the circumstances of her later home life, and her recent apparent lack of devotion to the child, were such as to render it advisable to have custody of the child transferred to the plaintiff. These matters could be taken into consideration as a basis for the conclusion. *Crater v. Crater*, 135 Cal. 633, 634, 67 P. 1049. No abuse of discretion has been shown.

The order is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, J., concurs in the judgment.

41 Cal.2d 581

MOSS ESTATE CO. v. ADLER.

L. A. 22631.

Supreme Court of California, in Bank.

Oct. 20, 1953.

Action to quiet title to land, wherein defendant filed a cross-complaint. The Superior Court, Kern County, William L. Bradshaw, J., entered a judgment adverse to defendant and defendant appealed. The Supreme Court, Traynor, J., held that defendant was not entitled to prove an asserted equitable interest under general allegation of ownership of a claim in well and water therefrom, which well was located on plaintiff's land.

Judgment affirmed.

For prior opinion see 257 P.2d 717.

1. Quieting Title ⚡43

In action to quiet title to land, wherein defendant sought to establish an equitable interest in a water well which was located on plaintiff's land which was adjacent to defendant's land, and to water therefrom, based upon violation of confidential and agency relation between defendant and another, which violation defendant contended was accomplished by means of asserted fraudulent representations which enabled such other person to secure for plaintiff entire benefit of well to exclusion of defendant, although neither plaintiff's nor defendant's land had sufficient area to justify drilling of a well, defendant was not entitled to prove such asserted equitable interest under general allegation of ownership of a claim in well and water.

2. Equity ⚡65(1)

Rule that whenever it is suggested that a plaintiff is guilty of fraudulent or otherwise improper conduct with respect to his claim, equity has duty to inquire into facts with respect thereto, necessarily presupposes that facts indicating improper conduct on part of plaintiff are properly before court.

3. Pleading ⚡229

Amendments to pleadings should be liberally allowed so that all issues may be properly presented. Code Civ.Proc. § 473.

4. Pleading ⚡236(3)

Question of whether filing of amended pleading should be allowed at time of trial is ordinarily committed to sound discretion of trial court. Code Civ.Proc. § 473.

5. Pleading ⚡261

Where defendant in quiet title action sought to file amended answer alleging a new defense based on different facts on eve of trial more than a year after original answer was filed and more than two months after defendant had notice of date set for trial, and defendant was aware of facts when original answer was filed but gave no excuse for delay, and original answer gave no inkling of facts alleged in proposed amended answer, and continuance would have been required had defendant been granted leave to file amended answer, trial court did not abuse discretion in denying defendant leave to file amended answer. Code Civ.Proc. § 473.

L. W. Wrixon, San Francisco, Joseph J. Jovino-Young, San Francisco, Kenneth H. Bates and Deadrich, Gill & Bates, Bakersfield, for appellant.

West, Vizzard, Howden & Baker and Gordon L. Howden, Bakersfield, for respondent.

TRAYNOR, Justice.

Defendant is the executrix of the estate of Theresa Riese, who owned a tract of land in Kern County adjoining a similar tract owned by plaintiff. For convenience we refer to defendant as the owner of the Riese property. In 1946 plaintiff leased its land to Mesa Farms for ten years commencing January 1, 1947. At about the same time defendant leased her land to William Fisher, the secretary of plaintiff corporation, and pursuant to an understanding with defendant, he assigned his lease to Mesa Farms. Pursuant to the terms of the lease, the lessee drilled a well on plaintiff's land 50 feet from the boundary of defendant's land and constructed irrigation works on both properties. Water from the well is now used by the lessee for

agricultural purposes on both plaintiff's and defendant's land. On December 4, 1950, plaintiff filed this action to quiet title to its land. It alleged that it was the owner of the land and that defendant claimed some interest therein. Defendant answered and alleged the existence of the facts set forth above with respect to the well and leases and claimed "a right and interest in the lands, well and subterranean waters underlying the lands of plaintiff * * *, together with such necessary easements as will enable defendant to receive from said well, as long as said well remains in use, a fair and equitable share of the waters taken from said well, representing waters underlying defendant's hereinabove described land which adjoins the said lands of plaintiff." Defendant also filed a cross-complaint alleging that plaintiff was withdrawing water from her land without her consent and sought damages therefor. At the trial defendant abandoned her claim to damages based on the alleged drainage of water from her land as well as her claim that the lessee was using water from the well on land other than that of plaintiff and defendant. The trial court granted judgment for plaintiff quieting its title against defendant, and defendant has appealed.

On April 16, 1952, 12 days before the date set for trial of the action, defendant filed a notice of motion for leave to file an amended answer. The motion was denied on April 22nd. At the trial she renewed her motion for leave to file an amended answer and made an offer to prove the facts alleged therein. The motion was again denied and the court held that the offered evidence was inadmissible under the pleadings. On the basis of these rulings defendant seeks a reversal of the judgment.

The facts alleged in the proposed amended answer, and which defendant offered to prove, may be summarized as follows: William Fisher, secretary of plaintiff, had for many years acted as defendant's business advisor and agent in her dealings with her property and was in a confidential relationship to her. At the time the leases were executed, Fisher knowingly and falsely represented to her that the lessee insisted

on drilling the well on plaintiff's land rather than on defendant's land or on the boundary between the two tracts. He also falsely represented to her that the lessor on whose land the well was located would have to pay the lessee \$10,000 for the well and its equipment on termination of the lease. In fact the lessee would have preferred to drill the well on defendant's land because of its higher elevation, but drilled it on plaintiff's land instead because plaintiff required it to do so. No payment will have to be made for the well on the termination of the leases. Neither plaintiff's nor defendant's land by itself has sufficient area to justify the drilling of a well. Thus, the lessee would not have leased one tract without the other and would not have drilled a well unless it could use the water on both tracts. Defendant would not have leased her land without requiring that the well be drilled on her property or on the boundary line, had Fisher not misrepresented the facts to her. Defendant is willing to bear her share of the expense of maintaining the well and claims an interest therein for the purpose of securing water for her land.

It thus appears from the proposed amended answer that defendant is seeking to establish an equitable interest in the well and the water therefrom based upon a violation of the confidential and agency relationships between her and Fisher. This violation was accomplished by means of fraudulent representations, and enabled Fisher to secure for plaintiff the entire benefit of the well to the exclusion of defendant.

[1] The first question presented is whether defendant was entitled to prove such an interest under a general allegation of ownership of a claim in the well and water. This question was decided adversely to her in *Strong v. Strong*, 22 Cal. 2d 540, 140 P.2d 386. In that case the court said, "Defendant contends that the judgment quieting title in her should be affirmed on the ground that she was induced by her husband's false representations to sign the deed. Defendant did not plead fraud, however, although the general rule that fraud must be specifically pleaded [citations] applies particularly to quiet title

actions. [Citations.] Defendant, moreover, is not the legal owner, for title passed on execution of the deed. [Citations.] Any rights that she might have to the cancellation of the deed or to the declaration of a constructive trust are entirely equitable [citations], and it is settled that such rights cannot be established in an action to quiet title when the pleadings contain merely general allegations asserting defendant's ownership and denying that of plaintiff. [Citations.]" 22 Cal.2d at pages 545-546, 140 P.2d at page 389; see also, *Munfrey v. Cleary*, 75 Cal.App.2d 779, 785, 171 P.2d 750; *Botchford v. Alt*, 71 Cal.App.2d 340, 345, 162 P.2d 984; *Borneman v. Salinas Title Guarantee Co.*, 66 Cal.App.2d 500, 503, 152 P.2d 649.

[2] Defendant contends, however, that it is the duty of a court of equity, whenever it is suggested that a plaintiff is guilty of fraudulent or otherwise improper conduct with respect to his claim, to inquire into the facts with respect thereto. See, *DeGarmo v. Goldman*, 19 Cal.2d 755, 764-765, 123 P.2d 1; *Rosenfeld v. Zimmer*, 116 Cal.App. 2d 719, 254 P.2d 137; *Howe v. Brock*, 86 Cal.App.2d 271, 276, 194 P.2d 762. This rule necessarily presupposes, however, that the facts indicating improper conduct on the part of the plaintiff are properly before the court. See, *Aalwyn's Law Institute v. Martin*, 173 Cal. 21, 26, 159 P. 158; *Munfrey v. Cleary*, 75 Cal.App.2d 779, 784, 171 P.2d 750; *Borneman v. Salinas Title Guarantee Co.*, 66 Cal.App.2d 500, 503, 152 P.2d 649; *Bank of America etc. Ass'n v. Goldstein*, 25 Cal.App.2d 37, 46, 76 P.2d 545; *Hagar v. Home Stores Inc.*, 85 Cal. App. 533, 534-535, 259 P. 1007; *Portuguese American Bank v. Schultz*, 49 Cal.App. 508, 515, 193 P. 806. Otherwise, a defendant could evade the rule that fraud must be specifically pleaded merely by offering to prove facts showing fraudulent conduct on the part of the plaintiff. In the present case there is nothing in the complaint, the answer, or the evidence introduced under the pleadings that indicates in any way that plaintiff or its agents was guilty of any fraudulent or improper conduct, and accordingly, the trial court was under no duty

to inquire into facts outside of the scope of the pleadings.

Defendant finally contends that the trial court abused its discretion in denying her leave to file her proposed amended answer. Defendant filed her answer and cross-complaint on February 13, 1951, more than one year before the case was set for trial. At that time plaintiff stipulated that defendant might file an amended answer within 60 days should defendant's consultation with an expert in water law indicate the desirability of an amendment. Plaintiff filed its answer to the cross-complaint on March 9, 1951, and in January, 1952, it notified defendant that the case was set for trial on April 28, 1952. Defendant took no action until 12 days before the date set for trial, when she noticed her motion to file her proposed amended answer. Plaintiff's attorney filed an affidavit in opposition to defendant's motion and resisted her application for leave to file an amended answer on the following grounds: The case had been at issue 13 months when the motion was made. Although defendant knew of the facts alleged in her proposed amended answer before plaintiff's complaint was filed, she offered no excuse for the delay in pleading them. Defendant's attorney had discussed the case with plaintiff's attorney two months after the original answer was filed, but at that time made no request to amend the answer. Since the proposed amended answer raised new issues of fact with respect to the alleged fraudulent representations, if leave to file were granted, the trial would have to be continued to allow plaintiff time to investigate the factual issues thus raised for the first time. Plaintiff contended that it was entitled to go to trial under the original pleadings as scheduled.

[3,4] Although it is true, as defendant contends, that amendments should be liberally allowed so that all of the issues may be properly presented, the question whether the filing of an amended pleading should be allowed at the time of trial is ordinarily committed to the sound discretion of the trial court. Code Civ.Proc. § 473. In the present case we are not confronted with

an amendment designed to cure a technical defect in a pleading otherwise adequate to put the other party on notice of the true basis of the pleader's case. See, *Eatwell v. Beck*, 41 Cal.2d 128, 257 P.2d 643; *Burns v. Scooffy*, 98 Cal. 271, 276, 33 P. 86; *Chatfield v. Williams*, 85 Cal. 518, 520-521, 24 P. 839; *Hopkins v. Hopkins*, 116 Cal.App. 2d 174, 253 P.2d 723. Defendant's original answer was apparently based on the theory that a landowner may have an interest in a well located on adjoining land if that well taps a pool underlying both properties. At the trial, however, defendant abandoned this theory, see, *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 925-926, 207 P.2d 17, and sought instead to set up an entirely different defense. Although defendant offered no excuse for not seeking to file her proposed amended answer sooner, she contends that no delay in the trial would have been necessary. She bases this contention on the facts that she was fully prepared to prove the allegations of her proposed amended answer, and that Fisher was present in court and thus able to testify with respect to his part in the transaction. This contention assumes, however, the truth of her allegations. It may be conceded that if plaintiff had no defense to her claim, further preparation would have done it no good. If, on the other hand, defendant's proposed answer was not true, plaintiff needed time to investigate the facts and to secure evidence to support the testimony Fisher would have given to that effect.

[5] The trial court was thus presented with a situation wherein defendant sought to file an amended answer alleging a new defense based on different facts on the eve of the trial more than a year after the original answer was filed and more than two months after she had notice of the date set for trial. Defendant was aware of the facts at the time the original answer was filed, but she gave no excuse for her delay. The original answer gave no inkling of the facts alleged in the proposed amended answer, and a continuance would have been required had leave to file been granted. Under these circumstances we cannot say that the trial court abused its discretion in denying defendant leave to file her proposed

amended answer. *Scholle v. Finnell*, 167 Cal. 90, 102, 138 P. 746; *Manha v. Union Fertilizer Co.*, 151 Cal. 581, 584, 91 P. 393; *Lewis & Queen v. S. Edmondson & Sons*, 113 Cal.App.2d 705, 711, 248 P.2d 973; *Associated Telephone Co. v. Greenman*, 111 Cal.App.2d 193, 196, 244 P.2d 15; *Anderson v. Permenter*, 78 Cal.App.2d 378, 380, 177 P.2d 818; *Davies v. Symmes*, 49 Cal.App. 2d 433, 440, 122 P.2d 102; *Bank of America etc. Ass'n v. Goldstein*, 25 Cal.App.2d 37, 45-49, 76 P.2d 545; *McGushin v. Arnold*, 21 Cal.App.2d 271, 274, 68 P.2d 733; *Johnson v. Johnson*, 134 Cal.App. 460, 461, 25 P.2d 538; *Sullivan v. Richardson*, 119 Cal.App. 367, 370, 6 P.2d 567; *Hesse v. Commercial Credit Co.*, 97 Cal.App. 600, 602, 275 P. 970; *Hagar v. Home Stores Inc.*, 85 Cal.App. 533, 535, 259 P. 1007; *Portuguese American Bank v. Schultz*, 49 Cal.App. 508, 515, 193 P. 806; *Allen v. Los Molinos Land Co.*, 25 Cal.App. 206, 213, 143 P. 253.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



120 Cal.App.2d 798

PEOPLE v. RUTLAND.

Cr. 5023.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1953.

Defendant was convicted of grand theft of an automobile. The Superior Court of Los Angeles County, Mildred L. Lillie, J., entered judgment, and defendant appealed from the judgment and from sentence. The District Court of Appeal, Parker Wood, J., held that evidence sustained conviction and that an appeal from a sentence is not authorized.

Judgment affirmed, and purported appeal from sentence dismissed.

1. Criminal Law Ⓒ556

Fact that prosecution, in prosecution for grand theft of automobile, introduced statements made by defendant at time of his arrest, did not require court to accept as true those statements, which were favorable to defendant, and favorable statements were merely part of the evidence and were required only to be considered in connection with all of the evidence in the case.

2. Larceny Ⓒ64(1)

Though mere possession of stolen property is not alone sufficient to sustain conviction of grand theft, such possession plus slight corroborative evidence of other inculpatory circumstances will suffice.

3. Larceny Ⓒ64(1)

Possession of goods recently stolen may be considered by court in connection with other incriminating evidence and, if not satisfactorily explained, is a circumstance tending to show guilt.

4. Larceny Ⓒ68(3)

If explanation of possession of goods recently stolen is attempted by defendant in grand theft prosecution, it is for trier of facts to judge truth and plausibility of explanation.

5. Larceny Ⓒ65

Evidence sustained conviction for grand theft of automobile.

6. Criminal Law Ⓒ1023(10)

Purported appeal from sentence in grand theft prosecution would be dismissed by District Court of Appeal, since an appeal from a sentence is not authorized.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was convicted in a nonjury trial of the crime of grand theft of an au-

tomobile. The notice of appeal recites that defendant appeals from the judgment and sentence. Appellant contends in effect that the evidence was insufficient to support the judgment.

Donald F. Seitz, a witness called by the People, testified that about 1:15 p. m., on November 10, 1952, he parked his 1946 Ford automobile at a place on Wilmington Street in Los Angeles; about six minutes later he returned to where he had parked the automobile and it was not there.

Officer Teel, a witness called by the People, testified that about 2 p. m., on November 10, 1952, he saw a 1946 Ford automobile (the Seitz automobile) parked on the south side of Firestone Boulevard and slightly east of "Sunny's Auto Wrecking"; he observed the defendant and another man get out of the automobile and go into the wrecking place; he watched the automobile until they returned and, as they drove away, he stopped them; defendant was driving; he asked defendant if the automobile was his and defendant said "No" that a fellow by the name of "Herschel," whose last name he could not remember, lent the automobile to him for the purpose of going to a house on Florence Avenue; he (officer) then took defendant to the police station where defendant told him that Herschel lent the automobile to him in order that he might make a "contact" to sell 15 pounds of marijuana on Florence Avenue, and that he was going there when the officers stopped him. On cross-examination the officer testified that defendant told them that he could take them to Herschel; he (officer) told defendant he would let him talk to another officer and see what arrangements could be made; it was strictly a marijuana deal and was not in his line of investigation.

Another witness, called by the People, testified that he was "Parts" manager of Sunny's Automobile Parts Salvage; on November 10, 1952, defendant came into his place of business, said he was going into the Army and wanted to sell the tires and battery of his Ford automobile; he (witness) told defendant he did not buy loose parts and asked defendant what he would sell the complete automobile for; defendant

said it was a '46 Ford, and he would sell it for \$250; the witness said that was too high, and then the defendant left.

Defendant testified that one Herschel Gisbon gave him permission to use the automobile; Gisbon indicated to defendant that it was his automobile; defendant was going to see a friend, and was then to return the automobile to Gisbon at 103rd Street in Watts where he got the automobile. On cross-examination defendant testified that his first name is also Herschel; he had a conversation with Gisbon before Gisbon lent the automobile to him and Gisbon said that if defendant would go to Lee Anson's and make a "contact" for Gisbon to sell some marijuana that there would be \$80 in it for defendant; while defendant was driving to Anson's, he stopped the automobile for the reason that there was a boy riding with him who was going to sell some automobile parts and tires from his (the boy's) automobile; he did not know the boy's name; defendant did not go to the automobile supply place.

[1-5] Appellant argues to the effect that since the People introduced in evidence statements made by defendant at the time of his arrest they are bound by said statements. He relies on the case of *People v. Estrada*, 60 Cal.App. 477, 213 P. 67. The *Estrada* case is distinguishable from the present case. In that case the defendant, who was charged with murder, admitted the killing but claimed that he acted in self-defense. The defendant therein did not testify, and the People introduced in evidence a statement which was made by defendant on the day of his arrest. The evidence therein tended to show a justification for the killing, and there was no evidence which contradicted defendant's statement; on the contrary, the circumstantial evidence tended to corroborate defendant's statement. The court stated therein 60 Cal.App. at page 481, 213 P. 67, that there was nothing in the statement of defendant to warrant the conclusion that he acted other than in necessary self-defense. In the present

case, about 45 minutes after Seitz parked his 1946 Ford automobile on Wilmington Street, the defendant was observed driving it on Firestone Boulevard; the officer testified that he saw defendant go into the automobile wrecking place; a manager of that business testified that defendant came into his store and told him he had a 1946 Ford automobile and wanted to sell its tires and battery, and that he would sell the automobile for \$250. That evidence contradicts defendant's statement that one Herschel lent the automobile to him for the purpose of going to a house on Florence Avenue, and it also contradicts his testimony that he did not go into the wrecking place. The court was not required to accept the statements of defendant as proof. Those statements were merely a part of the evidence and they were to be considered in connection with all of the evidence in the case. "While the mere possession of stolen property is not alone sufficient to sustain a conviction of grand theft * * * such possession plus 'slight corroborative evidence of other inculpatory circumstances' will suffice." *People v. Wissenfeld*, 36 Cal.2d 758, 763, 227 P.2d 833, 836. "Possession of goods recently stolen may be considered by the court, however, in connection with other incriminating evidence and, if not satisfactorily explained, it is a circumstance tending to show guilt. * * * If an explanation of such possession is attempted by the accused it is for the trier of fact to judge of its truth and plausibility." *People v. Taylor*, 74 Cal.App.2d 363, 366, 168 P.2d 736, 738. The evidence was sufficient to support the judgment.

[6] Since an appeal from a sentence is not authorized, the purported appeal therefrom should be dismissed. *People v. D'Elia*, 73 Cal.App.2d 764, 766, 167 P.2d 253; see *People v. Tallman*, 27 Cal.2d 209, 215, 163 P.2d 857.

The judgment is affirmed. The purported appeal from the sentence is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

120 Cal.App.2d 577

POOCHIGIAN v. LAYNE et al.

Civ. 19550.

District Court of Appeal, Second District,
Division 1, California.

Oct. 22, 1953.

Hearing Denied Dec. 17, 1953.

Action was brought for specific performance of lease of realty or, in the alternative, for damages. The Superior Court of Los Angeles County, Ellsworth Meyer, J., entered judgment dismissing complaint pursuant to § 437c of the Code of Civil Procedure dealing with summary judgment, and also entered an order denying motion for reconsideration of judgment, and plaintiff appealed from the judgment and order. The District Court of Appeal, Drapeau, J., held that affidavits in support of motion for summary judgment showed that there was no triable issue of fact and that therefore granting of motion for summary judgment was proper.

Judgment affirmed, and purported appeal from order dismissed.

1. Judgment ⇨185

Validity of summary judgment is to be determined by sufficiency of affidavits considered on hearing of motion for summary judgment. Code Civ.Proc. § 437c.

2. Judgment ⇨186

In passing on motion for summary judgment, primary duty of trial court is to decide whether there is an issue of fact to be tried. Code Civ.Proc. § 437c.

3. Judgment ⇨181(2)

If trial court, in passing on motion for summary judgment, finds an issue of fact to be tried, court is powerless to proceed further, but must allow such issue to be tried by jury, unless a jury trial is waived. Code Civ.Proc. § 437c.

4. Judgment ⇨634

Doctrine of "res judicata" is that an existing final judgment on merits of cause rendered by court of competent jurisdiction is conclusive of rights of parties thereto and their privies on all material issues, which were tried and determined, and on all issues, which might have been properly

tendered therein, in all subsequent actions or suits in any tribunal of concurrent jurisdiction involving the same points either directly or incidentally.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Res Judicata".

5. Judgment ⇨185

Where affidavits of defendants, in action for specific performance of lease of realty or damages, alleged that lease gave plaintiff option to purchase realty for certain sum to be deposited in escrow on or before certain date, and that at no time on or before such date was purchase price tendered to defendants or deposited in escrow, and that defendants had been ready, able, and willing to convey realty on or prior to date specified in lease, and that in unlawful detainer action by defendants against plaintiff, plaintiff admitted that purchase price was never tendered, and that defendants prevailed in unlawful detainer action, a triable issue of fact was not presented, and court did not err in granting defendant's motion for summary judgment. Code Civ. Proc. § 437c.

6. Judgment ⇨184

Where counsel for both parties had offices in same city, and notice of motion of defendants for summary judgment, together with affidavits in support thereof were served by mail by depositing them in post office in city where counsel had offices on May 23, and mail was addressed to plaintiff's counsel, and motion was noticed for June 3 and was actually heard on June 4, there was ample compliance with statute requiring that notice of motion be served on the other side at least ten days before motion. Code Civ.Proc. §§ 12, 437c, 1013.

7. Appeal and Error ⇨113(1)

Order denying motion for reconsideration of judgment is not appealable.

8. Appeal and Error ⇨113(1)

Where there is a right of appeal from judgment or order, a party cannot ordinarily appeal from a subsequent order denying motion to vacate judgment or order complained of, under such circumstances that motion merely calls for court to repeat or overrule former ruling on same facts.

9. Appeal and Error ⇨110

Order denying motion for new trial is not appealable.

Morris Lavine and Albert E. Isenberg, Los Angeles, for appellant.

Horton & Horton, Joseph K. Horton and Russell A. Barker, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff brought the instant action for specific performance of a lease of real property, or in the alternative for \$100,000 damages.

The lease was executed October 18, 1949 for a term of one year commencing October 15, 1949, and ending October 14, 1950. It provided for a monthly rental of \$600 for the premises which were unimproved, and for the construction of a building thereon by lessee. It gave to plaintiff the exclusive right to purchase the leased premises by depositing \$90,000 cash in any bank in Whittier, California, on or before October 14, 1950. And in the event he failed to exercise such option, plaintiff agreed to "surrender the possession of the premises and any building that may have been constructed thereupon to Lessors."

By his complaint, plaintiff alleged the terms of the lease, the commencement of construction of the contemplated building for which he expended \$50,000 and obligated himself for an additional \$140,000. Also, the tender of the purchase price of \$90,000 prior to October 14, 1950, and the refusal of defendants to accept it. That when he made such tender, defendants advised him to delay making payment until he could obtain funds at a lower rate of interest. He further alleged demand upon defendants for performance; his offer to compensate them for loss occasioned by his delay; refusal of both demand and offer by defendants. He also alleged performance of all conditions "of said agreement on his part, and has always been * * * and is now ready and willing to * * * fully perform and carry out its terms and conditions."

The answer admitted the commencement of construction of the building on the leased premises prior to December 18, 1949, but on information and belief denied that plaintiff had expended \$50,000 or obligated himself to expend any further sums. It also denied tender or offer by plaintiff to pay the purchase price and alleged plaintiff consistently refused and failed to make such tender or offer.

As an affirmative defense, defendants alleged the nonpayment by plaintiff of rentals provided in the lease; filing of mechanics' liens for \$92,000 because of indebtedness incurred by plaintiff in constructing the building, and his failure to pay or settle the same; failure of plaintiff to tender the purchase price and his refusal to surrender possession of the leased premises on October 15, 1950; and that therefore defendants were forced to file a suit in unlawful detainer to recover possession of said property. That at the trial in that action, all claims here asserted by plaintiff were litigated and judgment was rendered on January 29, 1951, in favor of defendants.

Thereafter, defendants moved for a summary judgment under section 437c of the Code of Civil Procedure, "on the ground that the within action has no merit."

From the judgment of dismissal following the granting of the motion, plaintiff appeals.

Appellant urges that the trial court erred in granting the motion for summary judgment where a triable issue of fact was presented.

Section 437c, Code of Civil Procedure, so far as material here, reads as follows:

"In superior courts * * * when an answer is filed in an action * * * for specific performance of a contract in writing for the sale or purchase of property * * * if it is claimed that * * * the action has no merit, on motion (of defendant) after notice of the time and place thereof in writing served on the other side at least ten days before such motion, supported by affidavit of any person or persons having knowledge of the facts * * * the complaint may be dismissed and

judgment may be entered, in the discretion of the court unless the other party, by affidavit or affidavits shall show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact."

[1] It is now settled law that the validity of a judgment entered pursuant to said code section "is to be determined by the sufficiency of the affidavits considered upon the hearing of the motion." *McComsey v. Leaf*, 36 Cal.App.2d 132, 133, 97 P.2d 242, 243.

[2, 3] And, as said in *Walsh v. Walsh*, 18 Cal.2d 439, 441, 116 P.2d 62, 64: "In passing upon a motion for summary judgment, the primary duty of the trial court is to decide whether there is an issue of fact to be tried. If it finds one, it is then powerless to proceed further, but must allow such issue to be tried by a jury unless a jury trial is waived. By an unbroken line of decision in this state since the date of the original enactment of section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns. *Security-First National Bank v. Cryer*, 39 Cal.App.2d 757, 104 P.2d 66; *McComsey v. Leaf*, 36 Cal. App.2d 132, 97 P.2d 242; *Kelly v. Liddicoat*, 35 Cal.App.2d 559, 96 P.2d 186; *Shea v. Leonis*, 29 Cal.App.2d 184, 84 P.2d 277; *Bank of America v. Casady*, 15 Cal.App. 2d 163, 59 P.2d 444."

The motion herein which was heard on June 4, 1952, was supported by affidavit of defendant Lester Layne, to wit:

That on October 18, 1949, defendant lessors were owners in fee of the property in question, and entered into a lease with plaintiff which contained an option to purchase the premises for \$90,000, to be deposited in escrow in cash on or before October 14, 1950, in any bank in Whittier, California; that at no time on or before October 14, 1950, or at any other time, was the purchase price tendered or offered to defendants or deposited in escrow.

That in the unlawful detainer action brought by defendants against plaintiff for possession of the leased premises, plaintiff

testified on January 12, 1951, in the presence of affiant that the \$90,000 in payment of the purchase price was never at any time tendered to affiant; that at no time prior to the 14th day of October, 1950, or at any other time, did defendants refuse to accept any tender of the \$90,000 or refuse to receive said money; that no such tender has ever been made; and that defendants have been ready, able and willing at all times on and prior to October 14, 1950, to convey the premises to plaintiff as in the contract provided.

Affiant also averred that defendants never advised plaintiff against making payment of the purchase price or to delay making it until he could obtain funds at a lower rate of interest; but that at all times they besought plaintiff to carry out the terms of the contract. That at the trial of the unlawful detainer action, plaintiff testified under oath in the presence of affiant, that his failure to procure the loan "was due to the fact that the loan offered was onerous", and that he "could not have complied with the terms thereof"; that he did not have the money with which to pay the purchase price, and never did tender the same to defendants. In this connection, it is averred that plaintiff testified in said action that in addition to the \$90,000 purchase price, he would have to pay about \$90,000 for unpaid bills and as well \$5,000 in commissions. As a result, the loan of \$150,000 was about \$35,000 short of providing enough money to clear the property.

Defendant Layne further avers that plaintiff incurred indebtedness for labor and material used in constructing the building on the leased premises for which mechanics' liens were filed in an amount of \$92,280.74 which defendants had to settle in order to protect their property. In addition, plaintiff failed to pay the monthly rental amounting in the aggregate to \$3,000, and also collected \$1,465 upon leases prior to October 14, 1950, no part of which has been repaid to defendants.

Mr. Merton G. Wray also supported the motion by affidavit to the effect that he never advised plaintiff not to pay the purchase price or to delay making such payment until funds could be obtained at a

lower rate of interest, but that he "did at all times on and prior to the 14th day of October, 1950, request and seek plaintiff to carry out the contract on his behalf."

In opposition to the motion, the affidavit of plaintiff avers that prior to October 14, 1950, he spoke with Mr. Wray and told him he could get the necessary funds from a lending agency but would have to pay 10% interest and a bonus of \$5,000; but that "said attorney acting on behalf of said defendants informed plaintiff not to do so, but that if he was going to pay any \$5,000 bonus, to pay the same to Mr. and Mrs. Layne."

Also, that he applied to Guardian Insurance Company for a loan to cover the purchase price of the leased premises; that said company forwarded documents to defendants to be signed and returned so that the loan could be completed; that defendants did not return the documents to the company and "for that reason the loan was not obtained."

Further, that excerpts of testimony from the unlawful detainer trial quoted in defendant Layne's affidavit were not the complete testimony of plaintiff at that time and place; that other questions were asked and other answers given which explained "the reason for the \$90,000 not being tendered and explained the request for loan to obtain said \$90,000 and the offer to defendants to obtain said money and purchase said property." That affiant expended \$50,000 of his own funds in construction of the building on the premises and received no benefit therefor. "The sums received for advance rentals were paid back into the building for the construction thereof. That at the present time, the defendants have the building, the premises, the leases and all the benefits derived therefrom and affiant has nothing."

The lease required tender of the purchase price of the premises on or before October 14, 1950. In addition, appellant agreed that if he failed to exercise the option to purchase that he would "on the expiration date of this lease, to-wit: the 14th day of October, 1950, quietly and peaceably surrender the possession of the premises and any building that may have been constructed thereupon to Lessors."

Appellant admits that tender of the purchase price was not made and the affidavit in support of the motion for summary judgment discloses that respondents had to bring an action in unlawful detainer to regain possession of the leased premises.

On this appeal, appellant asserts that his affidavit in opposition to the motion pleaded "an estoppel and waiver under equitable principles" and therefore, it presented an issuable fact to be tried by the court.

As hereinabove noted, respondents' affidavit recited in detail the testimony of appellant given at the trial of the unlawful detainer action.

In his affidavit in opposition thereto, appellant did not refute these averments except to state that the testimony as shown in respondents' affidavit was not "the complete testimony of affiant at said time and place."

In the unlawful detainer action which involved the right of respondents to possession of the leased premises, it was necessary for the court to determine whether appellant had exercised his option to purchase.

Respondents here argue that their affidavits show that the judgment in the previous action between the same parties is res judicata as to the instant proceeding. In respondent Layne's affidavit it is averred that the unlawful detainer action was tried on January 12, 1951; that the court determined that respondents were entitled to possession of the premises; that judgment to that effect was duly entered on January 29, 1951; that said judgment has not been appealed from and it is now final.

[4] "The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is conclusive of the rights of the parties thereto and of their privies on all material issues which were tried and determined and upon all issues which might have been properly tendered therein, in all subsequent actions or suits in any tribunal of concurrent jurisdiction involving the same points either directly or incidentally. (Citing

authorities.)" *Seidell v. Anglo-California Trust Co.*, 55 Cal.App.2d 913, 918, 132 P.2d 12, 15.

In the case of *Gosnell v. Webb*, 66 Cal. App.2d 518, 521, 152 P.2d 463, 464, the court applied the doctrine of *res judicata* to a motion for summary judgment under section 437c, Code of Civil Procedure, and held as follows:

"The parties who were before the court when the appeal was considered are the same parties who are before the court in the present action and they are bound by the previous ruling which disposed of the issues now presented. A matter which has been adjudicated by a court of competent jurisdiction must be deemed to have been finally and conclusively settled if it arises in any subsequent litigation between the same parties. The defense of *res judicata*, which is presented in the answer and in the affidavit of defendant, must be sustained."

[5] An examination of the record on appeal, discloses that no facts were presented to the trial court by the affidavits of the parties which were "sufficient to present a triable issue of fact," and that the court did not err in granting the motion for summary judgment.

Section 437c *supra*, requires that notice of motion be served on the other side "at least ten days before such motion". Appellant urges that here "The service was by mail, and therefore was less than ten (10) days from the date of the hearing."

[6] The record shows that counsel for both parties had offices in the city of Los Angeles; that notice of the motion together with affidavits in support thereof were served by mail pursuant to section 1013, Code of Civ.Proc., by depositing them in the United States Post Office at Los Angeles on May 23, 1952, addressed to counsel for appellant. The motion was noticed for June 3, 1952 and was actually heard on June 4th. Computed by excluding the first day and including the last, Section 12, Code of Civ.Proc., the period of time between May 23 and June 4, 1952, was twelve days.

This was ample compliance with the code section.

The constitutionality of section 437c *supra*, was upheld in *Cowan Oil & Refining Co. v. Miley*, 112 Cal.App.Supp. 773, 777, 295 P. 504 and in *Bank of America National Trust & Savings Ass'n v. Oil Well Supply Co.*, 12 Cal.App.2d 265, 270, 55 P.2d 885.

[7] Respondents must be sustained in their argument that no appeal lies from the order denying appellant's motion for reconsideration of the judgment.

[8] This for the reason that "where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of, under such circumstances that the motion merely calls upon the court to repeat or overrule the former ruling on the same facts." 3 Cal.Jur.2d 490, section 57.

[9] If considered as a motion for a new trial, it is not an appealable order. See *Bank of America National Trust & Savings Ass'n v. Oil Well Supply Co.*, 12 Cal.App.2d 265, 271, 55 P.2d 885, 888, where it is stated:

"* * * appellant, in the lower court, moved to vacate the order for summary judgment, which motion was denied, and an effort is made to appeal from this order as well as from the order granting the motion for summary judgment. These orders are not appealable. Appellant's only remedy under the circumstances is an appeal from the judgment. The disposition of the action by the trial court was a trial under the law and the so-called motion to vacate the order granting the summary judgment was, in legal effect, a motion for a new trial. This motion was denied and the order denying such a motion is likewise not appealable."

For the reasons stated, the judgment is affirmed. The purported appeal from the order denying motion for reconsideration of the judgment is dismissed.

WHITE, P. J., and DORAN, J., concur.

120 Cal.App.2d 194

ELBERT, Limited, v. FEDERATED INCOME PROPERTIES.

Civ. 19552.

District Court of Appeal, Second District,
Division 2, California.

Sept. 11, 1953.

Action for partition of realty. The Superior Court, Los Angeles County, Thurmond Clarke, J., rendered adverse interlocutory decree, and defendant appealed. The District Court of Appeal, Fox, J., held that where purchaser of tax deed from state redeemed certificate of sale issued as result of foreclosure of assessment bond issued on November 12, 1930, under Street Improvement Act, such purchaser thereby eliminated lien superior by virtue of such act to that of holder of bond, issued November 17, 1930, under Boundary Line Act, which incorporated a provision of Street Improvement Act, and purchaser would be entitled to be reimbursed out of proceeds out of partition action involving bondholder, who later perfected title, and purchaser.

Affirmed as modified.

Prior opinion 259 P.2d 478.

1. Partition ⇨111(1)

Purchaser of tax deed from state and purchaser of treasurer's deed to same realty after foreclosure of street improvement bond lien were each entitled, upon sale, to receive price paid for his interest plus half of excess proceeds consistent with ownership of an undivided one-half interest in realty as a tenant in common. St.1911, p. 1018, as amended by St.1929, p. 1712; Revenue and Taxation Code, § 3900.

2. Partition ⇨34

Action of partition is an equitable proceeding.

3. Equity ⇨62

Equity which penetrates beyond the form to the substance of a controversy is nonetheless bound by prescriptions and requirements of the law.

4. Partition ⇨87

Where titles of purchaser of tax deed from state and purchaser of treasurer's deed to same realty after foreclosure of street improvement bond lien were on parity, purchaser of tax deed was not entitled

to reimbursement out of proceeds of partition sale for taxes against realty which were paid by it before purchaser of treasurer's deed perfected title, since obligation of purchaser of tax deed to pay taxes was corollary of its ownership, failure to pay taxes would not have prejudiced improvement bond lien, and payment of taxes conferred no benefit upon purchaser of treasurer's deed. Revenue and Taxation Code, §§ 3712, 3900.

5. Partition ⇨87

Where titles of purchaser of tax deed from state and purchaser of treasurer's deed to same realty after foreclosure of street improvement bond lien were on parity, purchaser of tax deed was not entitled to reimbursement out of proceeds of partition sale for sums expended for attorney's fees in quiet title action or to sum expended for title search, before purchaser of treasurer's deed perfected title, since expenditures contributed nothing to partition action and did not inure to common benefit. Revenue and Taxation Code, §§ 3712, 3900; Code Civ.Proc. §§ 798, 799.

6. Municipal Corporations ⇨519(6)

Priority between successive realty assessment liens represented by street improvement bonds depends on the provisions of the statutes in force at time bonds were issued.

7. Municipal Corporations ⇨519(6)

In absence of any statutory enactment establishing a rule of priority for special assessments and bond liens, such liens are ranked in the inverse order of their creation, the last in point of time being superior in rank, or first in priority.

8. Partition ⇨87

Where purchaser of tax deed from state redeemed certificate of sale issued as result of foreclosure of assessment bond issued on November 12, 1930, under Street Improvement Act, such purchaser thereby paid off lien superior by virtue of such act to that of holder of street improvement bond, issued November 17, 1930, under Boundary Line Act, which incorporated a provision of Street Improvement Act, and such purchaser would be entitled to reim-

bursement out of proceeds of partition action involving bondholder, who later perfected title, and purchaser. Revenue and Taxation Code, §§ 3712, 3900; St.1911, p. 1018, as amended by St.1929, p. 1712; St. 1911, p. 730, as amended by St.1923, p. 280; St.1911, p. 730, as amended by St.1923, p. 115, and St.1927, p. 1407; Civ.Code, § 2903.

9. Equity ⚡54

It is a measure of the virility and flexibility of equitable principles that they may be applied to the end that neither party is permitted to secure an advantage to the prejudice of another and that interest of one party will not be diminished to any degree to advance the interests of another.

10. Partition ⚡87

One holding an after-acquired parity title who exercises the right of partition should be compelled to make an equitable adjustment as between him and an earlier tax title holder whose expenditures in connection with the realty redound to the common benefit. Revenue and Taxation Code, § 3712.

11. Appeal and Error ⚡863

On appeal from interlocutory judgment in action of partition between tenants in common, questions whether defendant was entitled to be reimbursed for costs expended, exclusive of attorney's fees, in quiet title action involving common realty and for cost of procuring quitclaim deed from record owner, were prematurely raised, since such allowances may only be awarded in final judgment. Code Civ.Proc. § 798.

12. Partition ⚡114(6)

In partition proceeding, costs or attorney's fees may not be allowed until final judgment is entered and have no proper place in interlocutory decree.

13. Partition ⚡114(6)

In partition proceeding, question whether services of attorneys for either of the parties have been for the common benefit and the reasonable value thereof is required to be determined at conclusion of litigation, at which time such fees may be specified and included in final judgment.

James M. Gammon, Los Angeles, for appellant.

John F. Bender, Compton, Gizella M. Allen, Los Angeles, for respondent.

FOX, Justice.

Defendant appeals from an interlocutory judgment in an action for the partition of real property.

This suit for partition was filed by plaintiff corporation in September, 1950, as tenant in common with defendant corporation of an undivided one-half interest in a vacant lot located in the County of Los Angeles. Defendant's answer admitted that it claimed an interest in the property but alleged it had expended certain sums for the common benefit and prayed that it be awarded this sum from the sale of the property, plus a reasonable attorney's fee, in addition to its one-half share of the net proceeds.

The evidence discloses that defendant's title to the property derives from its purchase of a tax deed from the State of California in December, 1945, for which it paid the sum of \$70. At that time the property was subject to a lien of plaintiff's street improvement bond, issued November 17, 1930, under the Boundary Line Act of 1911. Plaintiff's lien was carried into title through foreclosure proceedings pursuant to which it received a Certificate of Sale on December 3, 1948. It received its Treasurer's Deed on June 12, 1950.

Subsequent to its acquisition of its tax deed in 1945, defendant paid the current yearly taxes accruing up to and including the year 1949, in the sum of \$90; it paid \$238.58 to redeem a Certificate of Sale which had been issued on another street improvement bond which was a lien on the property at the time defendant purchased its tax deed, and it paid \$25 to Leslie Wood, the record owner of the fee prior to the tax sale, for a quitclaim deed to the property. Defendant also disbursed \$22.50 for a title search by the Title Insurance and Trust Company and expended the sum of \$100 as costs and attorney's fees in a quiet title proceeding against the County of Los.

Angeles, which appeared to have an interest in the property for sums advanced by it as relief payments to the former fee-holder. These expenditures, totalling \$494.98, were incurred before plaintiff received its Treasurer's Deed in 1950, for which it paid \$450.56.

Following a trial, the court found that plaintiff and defendant were tenants in common, by virtue of parity of titles, each owning an undivided one-half interest in the property, with plaintiff holding an equitable lien of \$450.56 and defendant holding an equitable lien of \$70 based on the amounts paid for the Treasurer's Deed and the tax deed respectively. It found that all of the expenditures made by defendant and enumerated above occurred prior to the date the Treasurer's Deed was issued to plaintiff on June 12, 1950. The court ordered partition by sale, holding that plaintiff had a lien for \$450.56 and defendant a lien for \$70, and adjudged that defendant was not entitled to reimbursement for its expenditures prior to June 12, 1950. The court further decreed that from the proceeds of the sale, after payment of referee's fees and expenses incident to the sale, there be paid to plaintiff the sum of \$450.56 and to defendant \$70, with any balance equally distributed to the parties. The decree also awarded to plaintiff reasonable counsel fees and costs, including the cost of abstract of title, the necessity for which and its availability for the use of the parties plaintiff had alleged in its complaint.

Defendant essentially raises two issues for consideration, each of which contains elements requiring particularized discussion. These are:

(1) Did the court err in failing to reimburse defendant from the proceeds of the partition sale for the sums it expended:

(a) In paying annual taxes levied on the property through 1949;

(b) In bringing a quiet title action against the County of Los Angeles;

(c) In obtaining a report of title search;

(d) In redeeming the Treasurer's Certificate of Sale obtained by the holder of a bond lien;

(e) In procuring a quitclaim deed from the record owner of the fee.

(2) Did the court err:

(a) In awarding costs and authorizing counsel fees to plaintiff in the interlocutory decree;

(b) In not awarding a similar relief to defendant.

[1] The parties are in accord that the respective tax liens of plaintiff and defendant are on a parity. Rev. & Tax.Code, § 3900; *Monheit v. Cigna*, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995. As a consequence of such liens having been carried into deeds acquired by private purchasers, "each tax purchaser is entitled upon sale to receive the price paid for his interest plus half of the excess proceeds consistent with ownership of an undivided one-half interest in the property as a tenant in common. [Citations.]" *Anger v. Borden*, 38 Cal.2d 136, 139, 238 P.2d 976, 978. Relying on this rule, and making reference to general principles of subrogation, defendant contends that it is entitled to reimbursement for each item of expense already mentioned prior to the division of proceeds of a partition sale. Plaintiff's reply to this is disarmingly simple: since no co-tenancy existed at the time of these advances, defendant cannot support its claims either on the theory of subrogation or contribution.

[2,3] It is beyond cavil that all of the expenditures occurred prior to the creation of a tenancy in common between the parties in June of 1950. However, although the action of partition is of statutory origin in this state, it is nonetheless an equitable proceeding, *Goodale v. Fifteenth Dist. Court*, 56 Cal. 26; *Emeric v. Alvarado*, 64 Cal. 529, 2 P. 418, and in its evolution has been conditioned and controlled by the broad principles governing equity jurisprudence. *Jameson v. Hayward*, 106 Cal. 682, 687-688, 39 P. 1078. Whenever a party affirmatively seeks relief through the interposition of the remedy of partition, the courts have adhered, in adjusting the rights of co-tenants and defining their interest in the common property, to the classic formulas encapsuled in the maxims that equity is

equality and he who seeks equity must do equity, and have dispensed equitable relief only upon condition that the equitable rights of a co-tenant are respected and safeguarded. *Ventre v. Tiscornia*, 23 Cal. App. 598, 605, 138 P. 954; *Willmon v. Koyer*, 168 Cal. 369, 143 P. 694, L.R.A.1915B, 961. We must therefore examine defendant's claims in harmony not only with these established principles, but cognizant that equity, which penetrates beyond the form to the substance of a controversy, is nonetheless bound by the prescriptions and requirements of the law.

[4, 5] Defendant's claim of reimbursement for taxes must be disallowed. The tax deed obtained by defendant from the State conveyed to him a complete title, *Rev. & Tax.Code*, § 3712; *Helvey v. Sax*, 38 Cal.2d 21, 24, 237 P.2d 269, subject only to the continued existence of designated tax and assessment liens of equal rank as an encumbrance on the property. *Rev. & Tax.Code*, § 3520; *Monheit v. Cigna*, supra; *Elbert, Ltd., v. Nolan*, 32 Cal.2d 610, 615, 197 P.2d 537; *Neary v. Peterson*, 1 Cal.2d 703, 705, 37 P.2d 82. As owner of the fee, defendant could have at any time discharged such liens by payment of the amount due. Further, defendant would have been entitled to any rents or profits produced out of the property by virtue of his status of title holder. *Rev. & Tax.Code*, § 3712; *People v. Maxfield*, 30 Cal.2d 485, 183 P.2d 897; see *Merchants Finance Corp. v. Kuchel*, 83 Cal.App.2d 579, 189 P.2d 513. Prior to its accession to the position of co-tenant, plaintiff was a mere lien-holder with no right to share in any yield from the property, and with no warrant to exercise any rights of ownership therefrom. The taxes paid by defendant were solely its own obligation, a corollary of its ownership of the fee. Just as its failure to pay taxes would in no way prejudice plaintiff's lien so did defendant's payment of such taxes confer no boon upon plaintiff for which it should be obliged to reimburse defendant. Likewise, by the express mandate of section 798 of the Code of Civil Procedure, that part of defendant's outlay of \$100 in the quiet title action against the County of Los Angeles which it paid out as counsel fees

is not chargeable as a part of defendant's lien. So, too, the sum of \$22.50 spent for a title search was an expenditure for defendant's own purposes, to ascertain for its own use the identity of interested parties and to inform itself of outstanding liens, encumbrances or clouds on its title. It contributes nothing to the present action nor does it inure to the common benefit; and to be compensable, under section 799 of the Code of Civil Procedure, its procurement should be pleaded in the complaint, in which should also be stated its availability for the inspection and use of all the parties to the action. Defendant has made no such showing.

[6] With respect to defendant's payment of the sum of \$238.58 to redeem a certificate of sale issued upon a street improvement bond which was a lien upon the property at the time defendant purchased its tax deed, a different situation prevails. The determination of this issue depends on the answer to the crucial question of whether the certificate of sale which defendant redeemed after foreclosure of a bond lien (hereafter called Bond 48) was issued in favor of a lienholder whose bond lien was paramount or subordinate to the bond lien through which plaintiff derived his parity title (hereafter called Bond 568). Priority between successive assessments liens represented by bonds depends, of course, on the provisions of the statutes in force at the time the bonds were issued. Applying elementary principles of security transactions to the case at bar, if the lien of defendant's Bond 48 was junior to that of plaintiff's Bond 568, then it cannot be said that defendant's redemption of the certificate of sale issued upon the foreclosure of Bond 48 contributed any benefit to plaintiff. For in any event, the property would have remained subject to plaintiff's senior lien, with the ever-present possibility that in the event of a subsequent foreclosure by the senior lienholder, the property could be sold and conveyed free and clear of the junior lien, upon the junior lienholder's failure to exercise his right of redemption. Thus it is obvious that no interest of plaintiff's was served if defendant merely paid off a lien over which plaintiff's lien had priority.

But if, on the other hand, Bond 48 was superior to Bond 568, then it is patent that defendant has protected and helped to perpetuate and preserve plaintiff's lien. For under such circumstances, unless plaintiff itself had exercised its right of redemption by paying off the paramount lien of Bond 48, its rights as a junior lienholder could have been completely wiped out upon conveyance of the property to a purchaser at a foreclosure sale. In such a situation, defendant, having paid off the obligation not as a stranger or intermeddler but to protect his own interest, would become entitled to subrogation. *Diehl v. Hanrahan*, 68 Cal.App.2d 32, 37, 155 P.2d 853.

[7,8] Turning now to a consideration of the question of priority as between the successive assessment liens of plaintiff and defendant, the record shows that plaintiff's Bond 568 was issued on November 17, 1930, under the provisions of the Boundary Line Act of 1911, Stats.1911, ch. 496, p. 1018, as amended Stats.1929, ch. 817, p. 1712. It has been stipulated between the parties that the certificate of sale which defendant redeemed was issued as a result of the foreclosure of an assessment bond issued on November 12, 1930, under the Street Improvement Act of 1911, Stats.1911, p. 730, as amended Stats.1927, p. 1407. "It is well established in this state * * * that in the absence of any statutory enactment establishing a rule of priority for special assessment and bond liens, that such liens are ranked in the inverse order of their creation, that is to say, that the last in point of time is superior in rank, or is first in priority." *Cullinan v. Grey*, 18 Cal.2d 247, 249, 115 P.2d 460, 461. It will be noted that at the time of the issuance of plaintiff's Bond 568 there was in effect the 1929 amendment to the Boundary Line Act of 1911, Stats.1929, ch. 817, p. 1712, whose section 11 effected an amendment of section 37 of the Boundary Line Act then in force. The pertinent language of that amendment of section 37 relating to the issuance of improvement bonds reads, p. 1727: "Any council * * * passing a resolution of intention * * * shall have power * * * to determine that serial bonds shall be issued to represent assessments of twenty-

five dollars, or more, for the cost of the * * * improvement authorized by this act, * * * and the said bonds shall be issued under the provisions of *part three* of an act of the Legislature * * * entitled * * * (here follows the title of the Street Improvement Act of 1911) approved April 7, 1911, as amended and as the same may hereafter be amended * * *. The said provisions of said part three of said act and the amendments which may hereafter be made thereto are hereby incorporated in and adopted as a part of this act * * *." (Italics added.) In other words, the issue as to the priority of the respective bonds is governed, as far as concerns defendant, by the provisions of the Street Improvement Act of 1911, in its entirety, and so far as plaintiff is concerned, by the provisions of part three of the selfsame act relating to the issuance of bonds representing assessment liens, which is incorporated into the Boundary Line Act of 1911, as amended.

Adverting now to the applicable language of the Improvement Act of 1911 at the dates here pertinent (Nov. 12, 1930, defendant's bond; Nov. 17, 1930, plaintiff's bond), we find in part three of said act section 66, which refers to the liens of assessment bonds. Section 66 provides in part: "* * * said assessment shall be a first lien upon the property affected thereby until the bond issue for the payment thereof, and the accrued interest thereon and the penalties, if any, shall be fully paid according to the terms thereof." Stats.1923, p. 280. It is under this section that the lien of plaintiff's bond is created and by which priority is established. Thus in *Balaam v. Pacific States Sav. & Loan Co.*, 219 Cal. 612, 28 P.2d 1053, which involved a dispute as to priority between two bonds issued under the Street Improvement Act of 1911, it was held that the rule of inverse priority applies, so that the bond issued last in time was inferior in rank. It was argued by the holder of the earlier bond that such bond merely stood in place of and continued the cash assessment lien provided for in section 23 of the Act, which at that time provided that upon recordation of an assessment "the several amounts assessed shall

be a lien upon the lands * * * assessed * * * for the period of two years from the date of said recording, unless sooner discharged; such lien shall be subordinate to all special assessment liens previously imposed upon the same property, but it shall have priority over all special assessment liens which may thereafter be created against the said property". Stats.1923, p. 115. However, the court rejected the contention that section 23 regulated priority of liens when bonds had been issued to represent unpaid assessments by deciding that two separate and distinct assessment liens were created under the Act. One lien arose by virtue of section 23, which creates a cash assessment lien, the other by section 66, under which a lien arises by the issuance of the bond itself.

However, the law as announced in the Balaam case was changed by legislative intervention in 1927, when section 23 of the Improvement Act of 1911 was amended. Stats.1927, p. 1407. As already noted, section 23 had previously provided that the amounts assessed upon recordation of the assessment should be a lien "for the period of two years from the date of said recording unless sooner discharged".¹ This sentence was followed by the provision that such lien should be subordinate to all previously imposed special assessments, but superior to subsequent special assessment liens. The 1927 amendment provided that the amount assessed under section 23 should be a lien, and should continue as a lien "until it be discharged of record." The sentence regulating priority remained unaffected by the amendment. In construing the effect of the 1927 amendment in *Thompson v. Clark*, 6 Cal.2d 285, 57 P.2d 490, the court was called upon to decide priority between a bond owned by plaintiff issued in 1930 under the Improvement Act of 1911 and a bond owned by defendant issued under the Bond Act of 1915. It was held that by operation of the 1927 amendment to section 23, defendant's earlier bond was superior in right to the later bond of plaintiff.

The court pointed out that the rationale of the Balaam case was that the bond lien of section 66 was a different lien from the cash assessment lien created under section 23. But by force of the 1927 amendment to section 23, the lien there created henceforth continued not for two years but until it is discharged of record. If a bond is issued, such discharge can occur only when the bond issued to represent the assessment is paid in full; the life of the lien under section 23 was thus extended to the exact time required to discharge the bond lien. Its effect, therefore, was to make the liens referred to in section 23 and section 66 identical. Therefore, the order of rank set forth in section 23, which assigns priority to liens created earlier in time, governs also the bond liens referred to in section 66. This rule was reiterated in *Cullinan v. Grey*, 18 Cal.2d 247, 115 P.2d 460, which involved an action to foreclose a bond issued in 1926 under the Improvement Act of 1911. Defendant held a bond issued in 1929 under the Street Opening Bond Act of 1911, Stats.1911, p. 1192. It was held that plaintiff's bond, issued earlier in time, was entitled to priority.

In applying these principles to the situation here presented, it is recalled that the defendant's Bond 48 was issued on November 12, 1930, five days earlier than the bond lien which plaintiff carried into title coequal with defendant's tax title. We must hold therefore that sections 23 and 66 of the Street Improvement Act of 1911, when considered together as said sections read in 1930, made the lien represented by Bond 48 superior to the later assessment lien represented by plaintiff's Bond 568. It follows that in paying off a lien superior to plaintiff's which would have remained a lien against the land even if plaintiff had at any time earlier foreclosed his junior lien, defendant has made it possible for plaintiff to become a parity title holder without being subject to such encumbrance.

Plaintiff attempts to resist the equity of defendant's position by comparing it to the

1. It may be noted that the counterpart of section 23 is section 11 of the Boundary Line Act. Section 11 contains the identi-

cal language quoted from section 23, and has never been amended. There is no provision therein regulating priority.

status of a hypothetical owner of property subject to a first and second mortgage who has paid off one of these mortgages. Plaintiff argues that such owner could not be subrogated as against the owner of the remaining mortgage. But this analogy is fallacious. In the supposed case, the owner's obligation is solely his own, and his failure to pay would result in the foreclosure of his rights. In the instant case, had defendant not redeemed the certificate of sale, its holder would have become a parity title holder with defendant and it would have been plaintiff, as holder of a subordinate lien, whose rights would have been jeopardized if not eliminated.

[9] Plaintiff maintains that in any event, because such lien was discharged prior to the time it became a tenant in common with defendant, defendant is not entitled, as to it, either to subrogation or contribution. This argument is clearly untenable, for as has already been indicated, defendant has paid off a lien superior to plaintiff's which plaintiff itself would either have had to redeem, as a junior lienor, or hazard the extinguishment of its rights upon a sale of the property by the dominant lienor. That such lien no longer exists, and that no third party with a superior lien and paramount right is on the scene is of undeniable financial advantage to plaintiff. Elementary concepts of fair and equitable apportionment between the parties should require that an allowance be made for this expenditure. Nor are we without authority to uphold such a conclusion. Section 2903 of the Civil Code provides: "Every person, having an interest in property subject to a lien, has the right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he was bound to make such redemption for their benefit." In the case of *Diehl v. Hanrahan*, 68 Cal.App.2d 32, 37, 155 P.2d 853, 856, the court states: "It is the general rule that the right of subrogation is given to one who, having a lien upon specific property, discharges a prior lien thereon in order to protect his own

claim, and this notwithstanding that he was not compelled to do so." Cf. *District Bond Co. v. Pollack*, 19 Cal.2d 304, 121 P.2d 7; 16 Cal.Jur. 349-51. It should not matter in an equitable proceeding that this transaction, culminating in the elimination of a prior lien-holder, took place before plaintiff became a tenant in common with defendant. It is a measure of the virility and flexibility of equitable principles that they may be applied to the end that neither party is permitted to secure an advantage to the prejudice of another and that the interest of one party will not be diminished in any degree to advance the interests of another.

Furthermore, defendant's redemption of an outstanding assessment lien which was superior to plaintiff's lien may also be considered as constituting a part of its *investment* in acquiring the property and perfecting the tax title it purchased. When so considered, the following language in *Monheit v. Cigna*, supra, 28 Cal.2d at pages 27-28, 168 P.2d at page 970, becomes particularly pertinent on the question of defendant's right to have such payment included as a part of its lien: "Also, since the property was originally subject to more than one lien on an equal basis, that is, without priority, the property should be subject to liens to the extent of the respective purchase prices paid. In that manner *each purchaser is given the full benefit of the investment* made by him in the purchase of the property. Otherwise absurd results would follow. One purchaser of the property would receive his interest for a few dollars, while another might have paid thousands. To effect *equality and parity* as between the co-owners there is therefore necessarily *an equitable lien against the property in favor of each co-tenant to the extent of the amount paid by him*. The result of such liens as between the co-tenants would be that in the event of the subsequent sale of the entire property, each co-tenant would be entitled to reimbursement for the amount paid by him before equal division of any excess." (Italics added.) In the case at bar we are presented with an *a fortiori* situation, for the property here involved was subject to special assessment liens of unequal rank inter se, and with the

lien of Bond 48, which defendant redeemed having priority over plaintiff's bond. In line with the philosophy of the Monheit case, we entertain no doubt that the amount paid by defendant to discharge a lien superior to plaintiff's lien is properly included in establishing the measure of defendant's equitable lien on the property in order that he may be "given the full benefit of the investment made by him in the purchase of the property." Otherwise, one of the "absurd results" apprehended by the court in the Monheit case would follow, for it cannot be gainsaid that an opposite conclusion would confer upon plaintiff an undeserved windfall, a truly unjust enrichment.

[10] Finally and of equally compelling significance, is the fact that such a conclusion is consonant with the broad statutory policy underlying the legislative pattern in treating the problem engendered by the existence of assessment liens and parity titles. Cf. *Stafford v. Realty Bond Service Corp.*, 39 Cal.2d 797, 805, 249 P.2d 241. In a line of cases culminating in *Monheit v. Cigna*, supra, it was established that liens emanating from the assessments of separate taxing entities were on a par, and a tax deed from one such agency would not extinguish a co-equal lien. However, in 1945 the Legislature enacted comprehensive changes affecting the duration and enforcement of assessment liens, which constituted a "revision of the entire subject." *Rombotis v. Fink*, 89 Cal.App.2d 378, 390, 201 P.2d 588, 591. This legislation, now embodied in section 2911 of the Civil Code and section 330 of the Code of Civil Procedure, provided for a statute of limitations and a definite period of time upon the expiration of which street improvement liens would be not only unenforceable by foreclosure but also would be presumed to have been extinguished. *Scheas v. Robertson*, 38 Cal.2d 119, 125, 238 P.2d 982. This legislation was actuated by a recognition of the deleterious effect which such liens had upon property, which remained fallow, unimproved and unproductive, and completely sterile as a source of tax income to the community. See *Rombotis v. Fink*, supra. It would not be in furtherance of the legislative design to allow a lien-holder to sit back while a

tax-title holder develops the property and renders it income-and-tax-productive by improvement or other means entailing the investment of funds, and then, by the grace of section 752, Code of Civil Procedure, to reduce his lien to a parity title and be permitted to partition and share equally in the increased value of the property. There would then be little incentive for one holding a tax title, with sufficient money only to improve the land but not fully to disencumber it, to invest his capital therein. The specter of such a lien-holder becoming, as here, a co-tenant equally entitled to share in his labors would haunt and daunt him. While this is not the precise case before us, it is an analogous one, and from it should emerge the principle that one holding an after-acquired parity title who exercises the right of partition should be compelled to make an equitable adjustment as between him and an earlier tax title holder whose expenditures in connection with the property redound to the common benefit. This would accomplish the ultimate objectives of preventing the accumulation of tax delinquent land in the hands of the taxing authorities and providing added incentive for the improvement and disencumbrance of such lands and making them positive contributors to the public revenue.

[11] Whether defendant is justified in its contention that it should be reimbursed for its costs (exclusive of attorney's fees) expended in the quiet title litigation against the County of Los Angeles is a question which is prematurely raised upon this appeal from the interlocutory judgment. That this item may, under proper circumstances, be legitimately apportioned between cotenants is clearly recognized by section 798 of the Code of Civil Procedure which provides: "If it appear that other actions or proceedings have been necessarily prosecuted * * * by any one of the tenants in common, for the protection, confirmation or perfecting of the title, * * * the court shall allow to the parties to the action, * * * all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit * * * and the same must be pleaded and allowed by the court, and included in the *final* judgment, * * *."

(Italics added.) Thus, such an allowance, where proper, can only be awarded in the final judgment, and the court properly excluded such determination from its interlocutory order. Similarly, the cost of procuring a quitclaim deed from the record owner, if found to be a reasonable expense for the common benefit, can only be allowed upon final judgment. We may observe in passing, however, that we are unable to agree with plaintiff's argument that merely because the expenses were incurred prior to the existence of the tenancy in common between the parties, such expenses cannot be allowed. In the light of our previous discussion of the equitable and public policy considerations which should control an action of this nature, it is our conviction that the court's final determination should be based not on when these expenses were incurred but rather as to whether such expenses were reasonable, served to advance the purposes of the partition proceeding, and whether they were ultimately for the common benefit. It is a matter of widespread knowledge that tax titles of every character have been viewed with great distrust by potential buyers,—who all too frequently and rudely discover they have purchased little more than a lawsuit. *Sheeter v. Lifur*, 113 Cal.App.2d 729, 249 P.2d 336; 62 Harv.L.Rev. 93. The merchantability of a title and in consequence the price which will be paid for the property it represents is clearly enhanced by a quitclaim deed from the record owner of the premises as well as by the removal of claims which becloud the title. The court, in computing the quantum of the lien of each of the parties, upon the completion of the partition sale, should not be foreclosed from awarding to each party such expenses in these respects as it may find were reasonably incurred in facilitating the saleability of the land and in assisting in securing a merchantable title to the ultimate purchaser.

[12,13] The final question presented relates to the provision in the interlocutory decree awarding costs and authorizing fees for plaintiff's attorney. The court erred in so doing. The law is clearly established that costs or attorney's fees may not be allowed until the final judgment is entered

and have no proper place in the interlocutory decree. *Broome v. Broome*, 179 Cal. 638, 645, 178 P. 525; *Harrington v. Goldsmith*, 136 Cal. 168, 170, 68 P. 594; *Williams v. Wells Fargo Bank*, 56 Cal.App.2d 645, 652, 133 P.2d 73; 20 Cal.Jur. 639. In *Broome v. Broome*, supra [179 Cal. 638, 178 P. 528], it is stated that "the subject of fees and costs [is] to be determined by the final findings and judgment", and in *Williams v. Wells Fargo Bank*, supra [56 Cal.App.2d 645, 133 P.2d 77], the court states "that whether the services of the attorneys for either or both parties have been for the common benefit, and the reasonable value thereof is matter for determination at the conclusion of the litigation, at which time such fees may be specified and included in the final judgment." This long-entrenched point of law is in no whit altered by the case of *Elbert, Ltd. v. Nolan*, 32 Cal.2d 610, 197 P.2d 537. In that case, plaintiff brought an action for partition and declaratory relief. The court denied plaintiff's right to partition and rendered a *final judgment* quieting title in defendant subject to the lien of the unpaid amounts of plaintiff's bonds. Upon appeal, the court reversed, holding that plaintiff had the statutory right to bring a partition action. In further declaring plaintiff's rights, the court determined that plaintiff was entitled to reimbursement for costs of partition and attorney's fees. No question was involved as to the propriety of including such costs and fees in an interlocutory decree, and the decision, in directing the court to order a partition sale, in no way intimates that attorney's fees shall be awarded at any time other than in accord with the practice established by the cases previously cited.

For the reasons stated, the interlocutory judgment of partition and order of sale is modified by adding the sum of \$238.58 to the amount of defendant's equitable lien therein decreed and striking therefrom the award to plaintiff of costs and counsel fees. As so modified, the judgment is affirmed. Each party to bear its own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.

120 Cal.App.2d 629

PEOPLE v. SHAHEEN.**Cr. No. 788.**District Court of Appeal, Fourth District,
California.

Oct. 15, 1953.

Rehearing Denied Oct. 29, 1953.

Prosecution for first degree robbery. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction, and entered order denying motion for new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held, *inter alia*, that the evidence was sufficient to support jury's implied finding that defendant had been sufficiently identified as the culprit.

Affirmed.

1. Criminal Law $\S$ 1159(2, 4)

In prosecution for first-degree robbery wherein issue was raised as to identification of defendant as the culprit, the strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if any, and the uncertainties of the witnesses in giving their testimony were matters solely for observation and consideration of jurors in first instance, and for consideration of trial court on motion for new trial.

2. Criminal Law $\S$ 1159(2), 1160

The District Court of Appeal may not disturb implied finding of jury that defendant had been sufficiently identified as the culprit who committed the crime charged, and may not disturb the action of the trial court in denying motion for new trial on alleged ground of insufficiency of identification unless it can be said that as a matter of law there was no evidence to support the conviction.

3. Criminal Law $\S$ 566

In order to sustain conviction, it is not necessary that identification of defendant as perpetrator of crime charged be positive or in a manner free from inconsistencies.

4. Criminal Law $\S$ 1159(2)

It is function of jury to pass upon strength or weakness of identification of defendant as the culprit who committed the crime charged, and uncertainties of witness-

es in giving their testimony, and unless evidence of identity is so weak as to constitute no evidence at all, District Court of Appeal cannot set aside decision of trial court.

5. Robbery $\S$ 24(3)

Evidence as to identification of defendant as culprit who committed crime was sufficient to support conviction for first-degree robbery.

6. Criminal Law $\S$ 757(1), 763(1)

Instruction that it was not necessary that identifying witness positively identify defendant as perpetrator of crime charged to support conviction if from examination of all evidence jury was convinced beyond reasonable doubt that defendant was perpetrator of the crime was proper and did not encroach upon right of jury to determine credibility of witnesses and weight to be given to their testimony.

7. Criminal Law $\S$ 814(17)

Instruction pertaining to evidence susceptible of two reasonable conclusions, and informing jury that under such circumstances it is their duty to follow that which points to defendant's innocence, is applicable only in case where proof is all, or chiefly, circumstantial.

8. Criminal Law $\S$ 814(17)

Instruction to effect that where circumstantial evidence alone is relied upon, circumstances must be not only consistent with guilt but irreconcilable with any other rational conclusion, should not be given where circumstantial evidence is merely incidental to and corroborative of direct evidence.

9. Criminal Law $\S$ 1186(4)

Record in prosecution for first-degree robbery wherein issue was raised as to identification of defendant as the culprit showed that while it might be argued that some complaints relating to admission and exclusion of evidence and allowance and limitation of cross-examination had merit, when entire matter was considered as a whole, no prejudicial error resulted. Const. art. 6, $\S$ 4 $\frac{1}{2}$.

10. Criminal Law $\S$ 1171(1)

Where offer of proof by prosecutor, who called himself as a witness to testify to

claimed conversation with defense counsel, was made in absence of jury and trial court sustained defense objection, no prejudicial error or misconduct resulted to defendant.

11. Criminal Law §941(1)

Affidavits offered by defendant in support of motion for new trial that witness, who had identified defendant as person who had committed crime charged, had stated after first trial that he had seen a man on the street who looked like the man who held him up because he looked so much like defendant and that when he next saw defendant in the flesh he knew he was not the guilty man would have been merely cumulative of that produced by defendant at trial and did not afford ground for new trial.

12. Criminal Law §911, 1156(1)

A motion for new trial is addressed to sound legal discretion of trial court and its action will not be disturbed on appeal except where abuse of discretion is clearly shown.

13. Criminal Law §911

Trial court did not abuse discretion in denying accused's motion for new trial.

Thomas Whelan, E. L. Bracklow, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of the crime of robbery in the first degree in that on February 11, 1952, by force and fear, he took \$10,000 from the possession of one Percy Welch, which money was the property of Julius Kahn and Earl Brodie, owners of the Club Royal. It was also found at the time, that he was armed with an automatic pistol. He entered a plea of not guilty to the charge, admitted four prior convictions of felonies, and that he served terms in state's prisons therefor.

On this appeal there is no question raised about the evidence not showing the offense was committed. The main complaint is that the evidence is insufficient to convict de-

fendant of the crime charged and particularly as to his identification as the culprit.

The evidence connecting the defendant to the crime charged may be thus summarized: Early in the morning on February 11, a robber gained entrance to the Club Royal, which was a cafe and bar located at Third and C Streets in San Diego. He exhibited a gun to Welch, the colored night janitor, who was then the only occupant of the club. After backing Welch into a hallway the robber tied Welch's hands and legs with tape, told him to be quiet, and then entered the office of the club, pried open the safe, and removed \$10,000 therefrom. He then told Welch that he had better not identify him or he would kill him and if he didn't he would get somebody to do it for him. The robber left. Welch worked his way to the street and the officers and proprietor were called. He gave the police his description of the hold-up man as "a man with dark * * * needed a shave * * * kind of a moon face, with black hair and shining black eyes, weighing about 150 pounds", was around 50 years of age and between 5 feet and 5-foot 3 inches tall. He testified he went to the police station to look at some pictures of certain individuals, but apparently did not identify any of them as being the picture of the culprit who robbed him. Later, in July and August, the officers obtained a picture of defendant and called Welch to the station and showed him several pictures, including that of defendant. Welch said that the photograph of defendant "looked like the man". The testimony is that he selected the defendant's photograph before any officer told him that it was defendant's picture. Welch requested that another "stand-up" photograph of defendant be obtained. Later the officers took the photograph to Welch at the place of his employment and one officer stated to Welch that "he knew it was the man" because "they got pretty good dope on him". It is true that Welch never made a positive identification of the defendant. On the other hand, he never said he was not the man.

It affirmatively appears that Welch was quite frightened the night he was accosted.

He was made to back up with the loaded pistol pointed at him. He had an opportunity to observe the accoster. One ceiling light of about 50 watts was lit, as well as a small light back of the bar. The accoster had on a dark-colored hat pulled down over his head and eyes, and only portions of his hair and face were visible to Welch. He was under admonition not to give an accurate description of the accoster. Apparently, from the statements of the trial court in denying a motion for new trial, the witness acted quite nervous while testifying in the presence of the defendant in the courtroom.

As to the identification of defendant and the circumstances and conditions under which Welch made the limited observation, his testimony, both direct and on cross-examination, may be thus summarized.

In a question propounded by the court as to whether or not the witness did or did not notice certain things that evening, Welch replied: "Judge, Your Honor, I was scared. I tell you I was so scared, I didn't think that I had no blood in my body for three or four days". He testified that the man who tied him up proceeded directly to the safe; that he seemed to know where it was and "to know his way around in there"; that he inquired of Welch, "Where is the safe, to my right?" and Welch said "Yes", and he commenced hammering on it; that defendant brought a little brown bag with him and carried the money away in it. When asked to describe the culprit Welch said he was wearing an overcoat and a dark hat, "needed a shave * * *". He was very hairy and very dark, and with long black whiskers". A dark hat was placed on Shahcen's head in the courtroom. Welch was asked to look at him and say if he resembled the man who held him up in the Club Royal, and he said: "Yes, he resembles him". Defendant was then asked to turn sideways and the witness stated: "Yes, he do resemble him." When asked if he thought the defendant was the man who held him up he stated: "I couldn't say that is the man, Your Honor, because I do not know * * I would like to say, myself, but I just cannot because I don't know. If I knew I

would say he was." He then testified that he had not, in his lifetime, seen anyone who resembled the man who held him up as much as the defendant did, but it did seem to him that the robber had more hair than defendant had at that time, and that his skin seemed darker, but he couldn't see much of his hair for the pulled-down hat; that he could not observe everything too well "because I was afraid"; that "the man's eyes were black and shiny * * looked desperate and dangerous" to him; that at the police station and trial defendant was smooth-shaven and his skin looked lighter than that of the culprit, but he could not say whether or not the darkness was due to sun-tan, but he thought the culprit "was born dark" but he knew he was not colored; that "his voice was rugged and sharp, sounded something like a foreign accent or broken English" and seemed to be different from the voice of the defendant when he was interviewed at the jail; that defendant appeared to him to have Jewish or Italian features.

The prosecution also produced the officers who returned the defendant from Ohio, where he was arrested about October 29, 1952. They related conversations had with him. Some conversation related to a picture of defendant which the officers had obtained in Ohio and defendant wanted to know where they secured it. Defendant asked the officers if they knew one Billie Layton, in San Diego, and the officers said they knew him as a gambler only. Defendant was silent for a moment and then said: "Well, I am sorting out the black peas from the green peas. * * * I might be able to come up with who fingered me". Defendant was asked whether or not he had been in San Diego and he denied ever being there or "pulling the job at the Club Royal". He stated he had been in Los Angeles. The officer told him he had heard that defendant had been "shook down" for the money in Chicago and defendant denied he had ever been in Chicago. In one conversation he stated that the Negro in San Diego would not be able to identify him and the officer said: "We haven't told you there was a colored person involved in this. You must know

something about it or how would you know there is a colored man involved?" Defendant remarked that his attorney in Ohio told him. The officer stated that so far as they knew his attorney did not know, and he then remarked: "Well, I heard it in Toledo". There is evidence, however, that the California officers did relate the facts to the Ohio authorities but not in the presence of defendant's attorney. The officers then stated that they and defendant started a conversation as to the difference in penalties in Ohio and California for the crime of robbery, and also pertaining to second-degree burglary. Defendant was informed that he was being returned on the charge of robbery, and the officer told the facts surrounding the commission of the crime with which defendant was charged. Defendant then remarked: "Why wasn't I charged with burglary? It sounds like burglary to me". The officers then testified that defendant's color at the trial was a little lighter than it was when they picked him up in Ohio because he had more sun-tan, and said he was always playing golf and never wore a hat; that his hair was then a little "bushier" on the sides when they picked him up because he then needed a haircut. One officer stated that the defendant told him he had not been in California at all.

When they arrived in San Diego the officer told defendant that the discussion they had in regard to the penalties for burglary was not correct since he had the opportunity to look it up, and defendant was asked if he intended to plead guilty to the charge and waive a preliminary; that defendant replied he "didn't intend to plead guilty at this time, that he would let us know"; that defendant again insisted on knowing how the officers obtained his picture in Ohio; that when confronted with a photostatic copy of a contract of sale of an automobile to him in Los Angeles about January 14, 1952, defendant was asked if that was his contract. He was then asked how long he had lived in Los Angeles and he said about four months but did not remember his address. He was then asked if he did not live at the Tower Apartments and he stated he did. He was again told about the neces-

sity of informing the district attorney of any contemplated plea of guilty and he replied that "he didn't intend to at this time". The officer then stated that about November 11, he talked to the defendant in jail and told him they had a local problem which they were trying to clear up and if defendant would give them some help on it they would be able to arrange it for defendant to enter a plea of guilty to second-degree burglary; that defendant stated he then had an attorney; that he didn't intend to "enter a plea at this time"; that if he wanted to change his mind he would have them contacted; that defendant did not speak with a foreign accent or broken English; that he was clean shaven when picked up in Ohio, and after three days on the train he noticed defendant had a dark beard sprinkled with quite a bit of grey.

The people then produced a patrolman doing duty on the vice squad in San Diego who testified that defendant was seen by him several times in the vicinity of the Club Royal, and he particularly remembered seeing him in the Royal Room of that club in the early part of February just before the robbery; that defendant was seated next to a known gambler and ex-bookmaker whom he knew; that when he was shown defendant's photograph he remembered seeing him on that particular occasion; that his memory of this occasion was on account of his specific assignment to watch this place because of complaints of law violation about that time; that when he saw defendant he was wearing a hat on the back of his head; that he could not say whether or not he was clean shaven, but his complexion seemed darker than at the time of trial; and that his eyes were brown. The court then asked the officer if there was any question in his mind at that time as to whether or not it was the defendant who was in the club that night, and he replied: "No, sir, there is not".

Witnesses were called from Los Angeles who testified that defendant turned in a car and purchased another one about January 14, 1952, and agreed to make monthly payments of \$90.44 thereafter; that a payment of \$30.40 was made on February 14th, and on February 20, defendant and his

claimed brother-in-law came to the office and paid \$140.88, paying the payments in advance in cash. The witness stated that both defendant and the claimed brother-in-law at that time were possessed of "rolls of bills * * * where he came from it would choke a horse", and that he saw "plenty of dough * * * that it might have been all ones or it might have been anything else". It was shown by the proprietor of the Tower Apartments of Los Angeles that defendant registered there on November 30, 1951, and his apartment was re-rented on February 9, 1952.

The defendant failed to testify on his own behalf. The only witness he produced was a lady who operated a safe near the Club Royal. She stated she knew Welch, remembered the pounding in the cafe on the night of the robbery, and that she went to the scene afterward and heard Welch describe the culprit's voice as "sounding like a foreign accent * * * maybe Mexican, Italian or Jewish"; that after defendant's return from Ohio Welch told her the picture of defendant "resembled him but I am not sure" because "when he pointed the gun at me I was real scared"; that while in court on the first hearing Welch told her the defendant was not the man who held him up and that after the second trial Welch told her he saw a man on the street that closely resembled the defendant; that she called the jailer and was informed that defendant was still in jail. It appears that this witness did not testify at the first trial and was shown to be quite friendly with Mr. Kahn and had never revealed these facts to him before that day.

Welch denied stating this to the witness and claimed he always told her that "I didn't know". On a motion for new trial the same contentions here presented were also presented by the defendant to the trial court and rejected.

Thus summarizing the evidence, Welch testified that defendant resembled the man who held him up, although he would not definitely state that he was the man. He did declare, however, that he had never seen anyone who resembled the man as much as the defendant. After seeing the pictures of defendant and identifying him

as he did, Welch signed an affidavit prepared by the district attorney to the effect that he was positive the defendant was the man. Welch testified on more than one occasion that the robber had threatened to kill him if he did not give a bad description, and it does appear that he was quite frightened at the time of the robbery and apparently also at the trial. While Welch's testimony identifying the defendant might well have been much more definite, yet nowhere in the record is there a sworn statement by Welch that defendant was not the man. He specifically denied making such a contrary statement to the witness produced by defendant.

In arguing that the evidence is legally insufficient to support the verdict defendant relies principally upon *People v. Gibbons*, 93 Cal.App.2d 28, 208 P.2d 411, in which this court reversed a judgment of conviction for robbery on the ground that the evidence of identification was legally insufficient. In that case the victim of the robbery testified very positively and on several occasions that the defendant was not the man, and in view of the unsatisfactory testimony of other witnesses a reversal resulted. In that case the defendant took the stand and denied being at the scene of the crime, established an alibi supported by three witnesses, and no element of fear pertaining to the victim's testimony about a description was shown.

[1-4] For many persons, positive identification is difficult even where one is observed under normal conditions. The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of the witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. This court may not disturb such finding or the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction. In order to sustain a conviction it is not necessary that the identification of the defendant as the perpetrator of the crime be positive or in a manner free from incon-

sistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony. Unless the evidence of identity is so weak as to constitute no evidence at all, this court cannot set aside the decision of the trial court. *People v. Kittrelle*, 102 Cal.App.2d 149, 227 P.2d 38; *People v. Waller*, 14 Cal. 2d 693, 96 P.2d 344; *People v. Addington*, 43 Cal.App.2d 591, 111 P.2d 356; *People v. Hightower*, 40 Cal.App.2d 102, 104 P.2d 378; *People v. Houser*, 85 Cal.App.2d 686, 193 P.2d 937; *People v. Soldavini*, 45 Cal. App.2d 460, 114 P.2d 415; *People v. Richardson*, 81 Cal.App.2d 866, 185 P.2d 47; *People v. Braun*, 14 Cal.2d 1, 92 P.2d 402.

[5] Applying the above rules to the instant case in the light of all the evidence adduced at the trial, there was ample evidence to support the verdict of the jury.

[6] The next point involves the instruction offered by the people and given reciting that it was not necessary that an identifying witness positively identify the defendant as the perpetrator of the crime to support a conviction if from an examination of all the evidence you are convinced beyond a reasonable doubt that the defendant was the perpetrator of the crime charged. It is argued that the instruction as given is an encroachment on the right of the jury to determine the credibility of the witnesses and the weight to be given to their testimony. The instruction as given was proper. *People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778; *People v. Richardson*, supra. The function of the jury in this respect was adequately covered in other instructions.

Defendant asserts that the court having given the above instruction erred in refusing to give defendant's proffered instructions in the language of Caljic Instructions Nos. 26 and 27, pp. 28-30, pertaining to evidence susceptible of two reasonable conclusions, and informing the jury that under such circumstances it was their duty to follow that which points to his innocence, and that where circumstantial evidence alone is relied upon the circumstances must be not only consistent with guilt but irreconcilable with any other rational conclusion, citing

People v. Koenig, 29 Cal.2d 87, 92, 173 P.2d 1 and *People v. Hatchett*, 63 Cal.App.2d 144, 146 P.2d 469.

[7,8] The first instruction has been held applicable only in a case where the proof is all, or chiefly, circumstantial, *People v. Marvich*, 44 Cal.App.2d 858, 113 P.2d 223; *People v. Jones*, 61 Cal.App.2d 608, 626, 143 P.2d 726. As to the second instruction, where the circumstantial evidence, as in the instant case, is merely incidental to and corroborative of the direct evidence, such an instruction should not be given. *People v. Alexander*, 92 Cal.App.2d 230, 235, 206 P.2d 657; *People v. Jerman*, 29 Cal.2d 189, 197, 173 P.2d 805.

Counsel for defendant sets forth ten points which he alleges constituted prejudicial error by the trial judge. They pertain to certain evidence offered by the prosecution to impeach their prosecuting witness Mr. Kahn without laying the proper foundation, improperly cross-examining him as their own witness, interrupting the cross-examination of Welch, allowing testimony that defendant's brother-in-law also possessed a large sum of money when seen with the defendant when making payments on the car, the asking of questions of a certain witness by the court which the defendant claimed was for the purpose of rehabilitating his testimony, asking questions which were not proper examination or were leading, and allowing the district attorney to ask leading questions and refusing counsel for defendant permission to further cross-examine one of the officers in connection with a conversation with the defendant concerning penalties for robbery and burglary.

It is sufficient to say that we have read the entire record in this respect and conclude that the subject matter was immaterial, the cross-examination was proper, the evidence was admissible, or if erroneously admitted was harmless, that the questions propounded were proper even if some were leading, and that any limit placed on defendant's right of cross-examination was not prejudicial.

Counsel for defendant concedes that some of the complaints made of the errors

of the trial court may seem inconsequential when considered alone but argues when all are considered together prejudicial error resulted.

[9] While it might be argued that some of the complaints had merit, when the entire matter is considered as a whole, we conclude that no prejudicial error resulted. Section 41½, Art. VI, Constitution.

[10] The claim of prejudicial misconduct on the part of the prosecutor involved questions propounded to his witness Mr. Kahn as to whether several people around his place of business did not ask him not to prosecute this defendant. Objection was sustained to the general line of questioning but the witness was allowed to give the name of one of such persons. Thereafter, the prosecutor asked the witness if he did not tell him that there was another man whose name he could not give, who talked to him about it. Objection was made to the question and sustained. Counsel for defendant demanded a mistrial which was denied. He now argues that the most serious complaint involved is in reference to the claimed misconduct on the part of the prosecutor in calling himself as a witness to testify to a claimed conversation had with counsel for defendant when the jury was out in the former trial, which conversation took place in the court's chambers in the absence of the defendant. Objection was made to the statement and the witness stated he wished to make an offer of proof. In the absence of the jury the offer of proof was made and the trial court properly sustained the objection. No prejudicial error or misconduct resulted. *People v. Dillon*, 1 Cal.App.2d 224, 230, 36 P.2d 416.

Lastly, it is argued that the court erred in denying the motion for a new trial. Complaint is made that in considering the mental state of Welch in failing fully to identify the defendant, the trial court made the following observation:

"Now Percy (Welch), I saw him in both trials, and the first trial he was particularly scared. He shook like a leaf. He was sort of used to it in the second trial but he was still scared."

The court also stated that he noticed defendant's physical appearance during the trial and that judging from a photograph taken of defendant after the trial, his whiskers did make his face look a lot fuller, and when he did put on a dark hat it made him look darker. By consent of the court on the motion for new trial, pictures were taken of the defendant while in jail and after he had not shaved for several days so the court could observe his general appearance. At the trial the jury had the opportunity to observe the defendant, with the exception of his growth of whiskers, and judge whether the description given by the victim was proper. From the picture offered, and made a part of the record on this appeal, the jury might well have believed that the color of defendant's eyes was quite dark, that his beard was dark, although tinged with grey, and that above all, he looked like some foreigner, and particularly of the Jewish extraction.

[11-13] The trial court fully considered the affidavit of counsel for defendant, and the affidavit of one Helen Crowe, who stated therein that Welch stated to her, after the first trial, that he saw a man on the street who looked like the man who held him up because he looked so much like Shaheen, and that Welch said when defendant was returned here and he saw him in the flesh he knew he was not the man. This evidence, if produced, would have been but cumulative to that produced by defendant at the trial. The court fully considered all aspects of the grounds for the new trial and no doubt considered the testimony of Welch in contradiction of these affidavits. A motion for a new trial is addressed to the sound legal discretion of the trial court and its action will not be disturbed on appeal except where an abuse of discretion is clearly shown. *People v. Gilbert*, 62 Cal. App.2d 933, 937, 145 P.2d 924; *People v. Henderson*, 79 Cal.App.2d 94, 124, 179 P.2d 406. No such showing has here been presented.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J.,
concur.

120 Cal.App.2d 657

TATE v. INDUSTRIAL ACC. COMMISSION et al.

Civ. 15756.

District Court of Appeal, First District,
Division 1, California.

Oct. 19, 1953.

Compensation claimant filed a petition for review of an award of the Industrial Accident Commission of the State of California denying claimant compensation for death of deceased employee, who was intoxicated at time of fatal automobile accident. The District Court of Appeal, Peters, P. J., held that question whether employer was estopped to raise defense that employee was intoxicated at time of accident was for Commission.

Award annulled.

1. Workmen's Compensation ⇨1691

Where compensation claimant did not know, at time of original hearing, that employer's district manager drank with deceased employee preceding fatal automobile accident, and witnesses had been instructed not to talk to claimant's counsel, and evidence concerning district manager's participation in the drinking first came into case only when district manager and fellow employee of deceased employee were called as adverse witnesses on rehearing, and claimant then immediately raised issue that employer was estopped to raise defense of intoxication, issue of estoppel was properly before Industrial Accident Commission. Code Civ.Proc. § 2055; Labor Code, §§ 5904, 5908.

2. Workmen's Compensation ⇨1802

Where compensation case is before Industrial Accident Commission by a general order granting a rehearing, case is before Commission on all issues, and Commission is under a duty to consider all of the facts. Labor Code, § 5908.

3. Workmen's Compensation ⇨1857

Provision of the Labor Code that petitioner for rehearing in compensation proceeding before the Industrial Accident Commission shall be deemed to have finally waived all points not set forth in petition

for reconsideration, merely means that petitioner cannot raise on writ of review points not raised before the Commission. Labor Code, §§ 5904, 5908.

4. Workmen's Compensation ⇨1802

When rehearing is granted by Industrial Accident Commission, compensation case is wide open again, and petitioner for rehearing properly may raise any point that he could have raised on original hearing. Labor Code, §§ 5904, 5908.

5. Workmen's Compensation ⇨1758

If there was any evidence in compensation case that would have supported a finding by Industrial Accident Commission that employer was estopped to rely on defense that employee was intoxicated at time of death, it was error for Commission not to have found on such material issue. Labor Code, §§ 3600, 5705.

6. Workmen's Compensation ⇨1726

Whether employer was estopped in compensation case from relying on defense that employee was intoxicated at time of death, was a question of fact and not of law. Labor Code, §§ 3600, 5705.

7. Workmen's Compensation ⇨798

An injured employee, or his family where employee is killed, cannot recover in compensation case, if injury or death is caused by voluntary intoxication of employee. Labor Code, §§ 3600, 5705.

8. Workmen's Compensation ⇨1114

An employer may, in a proper case, be estopped from asserting what otherwise would be a complete defense to claim for compensation.

9. Workmen's Compensation ⇨1114

An employer may be estopped by his actions from relying in compensation case on defense that employee was intoxicated at time of accident. Labor Code, §§ 3600, 5705.

10. Workmen's Compensation ⇨1114

In view of statutory provisions of Labor Code that employer must furnish employment and place of employment which are safe for employees, and that no employer shall require or permit any employee to

go or be in any employment or place of employment which is not safe, if an employer in a factory offers drinks to and encourages his employee to drink, so that employee gets drunk, and then employer orders employee to operate complicated machinery, and employee is hurt, employer, by his actions, is estopped to rely on defense of intoxication in compensation case. Labor Code, §§ 3600, 5705, 6400, 6402.

11. Labor Relations ⇨10

An employer, who sends an intoxicated employee onto a busy highway in employer's automobile, does not furnish employee with a safe place in which to work, as required by the Labor Code. Labor Code, §§ 3600, 5705, 6400, 6402.

12. Labor Relations ⇨7, 10

The Labor Code imposes on an employer the duty of supplying an employee not only safe employment, but a safe place of employment. Labor Code, §§ 6400, 6402.

13. Labor Relations ⇨7, 10

An important element of duty of employer to furnish employee with safe employment and safe place of employment is the maintenance of proper discipline. Labor Code, §§ 6400, 6402.

14. Workmen's Compensation ⇨1114

If employer permits intoxication or other dangerous practices among his employees, results thereof are industrial injuries for which employees are entitled to compensation. Labor Code, §§ 6400, 6402.

15. Workmen's Compensation ⇨1721

Evidence that employer's district manager asked employee to accompany manager to bar to watch manager collect bill for employer, and, knowing employee's past weakness in reference to liquor, manager, during employee's working hours, purchased drinks and participated in rounds of drinks purchased by employee, knowing that employee had to drive on main highway, raised question for Industrial Accident Commission in proceeding to recover compensation for death of employee as result of automobile accident whether employer was estopped to rely on defense that employee was intoxicated at time of accident. Labor Code, §§ 6400, 6402.

Roos & Jennings, San Francisco, for petitioner.

T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

Keith, Creede & Sedgwick, San Francisco, for respondent American Bldg. Maintenance Co.

PETERS, Presiding Justice.

Petition for a writ of review.

The Commission denied a death benefit to the minor son of Ernest Tate who was killed while operating a company car on company business, on the ground that the employee was intoxicated at the time of the accident. Thereafter, the Commission granted a rehearing. On rehearing it developed that the district manager of the employer not only knew that Tate was drinking, but participated with Tate in the drinking and purchased at least one round of drinks. The Commission again denied the death benefit, and failed and refused to pass upon the question as to whether, under such circumstances, the employer was estopped to raise the defense of intoxication. The precise question that is presented is whether there is sufficient evidence that would have supported a finding of estoppel. If so, the Commission should have found on such issue.

The facts, in more detail, are as follows:

Ernest Tate was employed as a janitor and supervising employee by the American Building Maintenance Company, a self-insured employer. He was furnished a company car and had an assistant, Deardorff by name. It was admittedly part of Tate's duties to drive the assistant to San Francisco after finishing his janitorial tasks in Marin County. While doing so, and admittedly while working in the course of his employment, at about 3 a. m. on October 7, 1950, Tate wrecked the car and was killed. His infant son, in due course, instituted this proceeding to recover a death benefit. The employer raised the affirmative defense that death was caused by the intoxication of Tate. Hearings were held in December, 1950, and January, 1951. The evidence then disclosed that on the night in question Tate and his assistant had worked in vari-

ous places in Marin County; that they were on their way home in the company car, with Tate driving, when Tate was observed to be driving most erratically, weaving in and out and crossing to the wrong side of the highway; that Tate cut in front of another car, hit it, and ran into the retaining wall on one of the approaches to the Golden Gate Bridge and was killed. A toxicologist testified that an autopsy disclosed that the alcoholic content of Tate's brain and blood disclosed that he recently had consumed eight to ten drinks of whiskey or beer, enough to make him intoxicated.

Max Allison, called by the petitioner under section 2055 of the Code of Civil Procedure, testified that during all times here relevant he was district manager of the employer in charge of all work in Marin County; that on the night in question Tate and his assistant Deardorff were required to work under his supervision in various buildings in and about San Rafael; that he saw Tate and his assistant several different times that night, the last time at about 2:30 a. m. when Tate and Deardorff called at Allison's home to deposit some equipment; that Tate then appeared to have "had a few," but did not appear drunk. At this hearing this witness failed to mention that he had visited several bars with both employees, and bought at least one round of drinks.

Deardorff, the helper, merely testified that he was with Tate upon the fatal night and was being driven to San Francisco at the time of the accident. He did not even refer to the subject of drinking.

On this evidence the Commission found that "The injury * * * was proximately and solely caused by the intoxication of the decedent." It held that the applicant was entitled to no relief.

The applicant, within the time prescribed by law, petitioned for a rehearing upon the grounds that the Commission had acted in excess of its powers and contrary to the evidence. The Commission, over the adverse report of its referee, granted a rehearing upon the ground that: "The record is convincing that further investigation is indicated. It is apparent that all evi-

dence available upon the issues presented was not adduced for the consideration of the Commission." Evidence on the rehearing was taken in May of 1951. The rehearing referee considered that the evidence on the prior hearing was before him, and took additional evidence. Deardorff testified that all he could remember was driving away from a bar in Marin County, the Drake Bowl, about 1:30 or 1:45 a. m. He could not remember any of the facts preceding the accident. But he did testify that the last place he and Tate had worked was the Food Bank, and that from there they went to the Drake Bowl, a bar, about a quarter of one, and stayed there for an hour, while he, the witness, consumed about six or seven highballs and Tate had four or five beers. He testified about the three or four jobs performed by him and Tate that evening, about Allison's visits, and claimed that, until the visit to the Drake Bowl, neither employee had had a drink. But he did testify that Allison was present at the Drake Bowl and participated in the drinking. While he did not remember who bought the drinks, he guessed "we all bought one or a couple of rounds apiece," probably alternately, according to custom. This witness could remember nothing further after leaving the Drake Bowl, not even stopping at Allison's to leave off the tools. Deardorff admitted that he had been instructed not to talk to applicant's counsel by counsel for the employer, and the employer's counsel stipulated that he had so advised Deardorff.

Max Allison also testified on the rehearing, again under section 2055 of the Code of Civil Procedure, and for the first time conceded that he had participated in the drinking activities of that evening. He testified that Tate and Deardorff were assigned to various jobs by him about 8 p. m.; that he went to a football game and later called on the two employees while they were working at a real estate office; that the men finished their work at this office about 10:30 p. m.; that he wanted to collect a bill owed to the employer by the Drake Bowl; that he "invited" the two employees to come with him to watch him collect the bill; that the manager of the

Drake Bowl was busy and the three men sat down and had a drink. He testified that Tate had only the proverbial two beers, and that he, Allison, paid for one round of the drinks. Deardorff was drinking mixed drinks. Allison then stated that he left the two men and went home. Tate and Deardorff then continued in their employment. About 1:20 a. m. Allison again visited the two men, this time at the Food Bank, to observe their work, and stayed with them until they finished this job, their last, at about 1:40 a. m. According to Allison, the three men then visited Bob's Tavern and stayed there until sometime after 2 a. m. Deardorff did not mention this bar. Before entering this bar Allison had told his two employees that he was broke, whereupon Tate invited him to be his guest at the tavern. There, according to Allison, he and Tate had a "couple" more beers. When the bar closed, the three then went to Allison's home nearby where Tate put back the tools he had taken earlier in the evening. Tate then made a telephone call and he and Deardorff left Allison's home for San Francisco at 2:30 a. m. Allison stated he did not believe that Tate was then drunk, or he would not have allowed him to leave. Allison also stated that Tate had worked for this same employer for seven or eight years; that about three or four months before the accident Tate had been warned about four to six times about drinking on the job. But Allison admitted that, although there was a company policy against the men drinking on the job which both he and Tate knew, he did not forbid Tate to drink on the night in question, but in fact had accompanied him in this activity and even bought him a drink.

During the taking of evidence on rehearing no direct reference to the doctrine of estoppel was made, but in the briefs subsequently filed it was urged that Tate's drinking was with the consent, knowledge and approval of the employer, that such was the proximate cause of the accident, and estopped the employer from urging intoxication as a defense.

On the rehearing, the referee's report referred only to the evidence of intoxication

and urged a denial of that application on the ground that the evidence on this issue was substantially similar to that on the original hearing. Based on this report, the Commission again found that intoxication was the cause of the accident, adopted the original findings, and denied recovery. This decision was rendered February 10, 1953, some eighteen and a half months from the date the last brief had been filed on the rehearing. No explanation of what caused this extraordinary delay appears in the record.

On February 17, 1953, the applicant filed with the Commission a document entitled "Petition for Reconsideration." The applicant stated that he knew that he had the legal right to petition but once for a rehearing, which right he had exhausted, but contended that the Commission had jurisdiction on its own motion to correct its findings and order where it had failed to find on a material issue, and urged that here prejudicial error had been committed by the failure of the Commission to find upon the material issue of estoppel of the employer to urge intoxication. The employer moved to strike this petition, and also urged that a finding on that issue was not required.

Before this second petition was acted upon, and within the time provided by law, the applicant filed the petition for a writ of review here under consideration. Thereafter, the referee of the Commission filed a report in reference to the petition for reconsideration. In this report the facts and proceedings are reviewed, and then the referee concludes that "At no time was the estoppel of the employer to plead the defense of intoxication made an issue in the instant case." The estoppel issue, it was stated, was first made in applicant's brief "after rehearing." The referee then stated that section 5904 of the Labor Code results in a waiver of all points not raised in the petition for rehearing. Based on this reasoning, the referee refused to pass upon the merits of the estoppel claim because the evidence to support it came in "too late." The referee concluded: "The contention that the employer should be held to be estopped from pleading the defense of intoxication of the

employee as the cause of injury was not overlooked, but a finding with respect to it was not considered proper or necessary because this contention had not been raised at the original proceeding or in the Petition for Rehearing."

The Commission thereafter made its formal order dismissing the petition for reconsideration, first, because it was an improper second petition for rehearing, and secondly, because the estoppel point "had not in the original proceeding or in the previous Petition for Rehearing been presented to the Commission for decision."

[1-4] The position then taken by the referee and the Commission that the estoppel point was not properly before the Commission on the rehearing because not urged in the petition for rehearing is not seriously now urged. There can be no doubt that such issue was then properly before the Commission. The petition was granted by a general order without limitation. In such a situation the case is again before the Commission on all of the issues, and the Commission is under a duty to consider "all of the facts". Labor Code, § 5908. The applicant did not know of Allison's participation in the drinking preceding the accident at the time of the original hearing, the witnesses having been instructed not to talk to applicant's counsel, and so did not know of it at the time the petition for rehearing was filed. This evidence first came into the case when Allison and Deardorff were called as adverse witnesses on the rehearing. Petitioner then immediately raised the issue in his briefs. While section 5904 of the Labor Code provides that the petitioner for a rehearing "shall be deemed to have finally waived" all the points not "set forth in the petition for reconsideration", that simply means that the petitioner cannot raise points on a writ of review not raised before the Commission. But when a rehearing is granted, the case is wide open again and the petitioner properly may raise any point that he could have raised on the original hearing. *Great Western Power Co. v. Industrial Accident Comm.*, 191 Cal. 724, 218 P. 1009; *Id.*, 196 Cal. 593, 238 P. 662; *Pacific Emp. Ins. Co. v. Indus-*

trial Accident Comm., 58 Cal.App.2d 262, 136 P.2d 633; *Hanna, Industrial Accident Commission Practice and Procedure*, pp. 229 and 235.

[5, 6] Thus, the real question presented is whether there was any evidence that would have supported an estoppel finding. If so, it was error, and prejudicial error, not to have found on such material issue. *Pierson v. Industrial Acc. Comm.*, 98 Cal. App.2d 598, 220 P.2d 794. Whether an estoppel did or did not exist was, of course, a question of fact and not of law. *Industrial Indem. Co. v. Industrial Acc. Comm.*, 115 Cal.App.2d 684, 252 P.2d 649.

Petitioner in the present proceeding concedes that the evidence supports the finding of intoxication. Section 3600 of the Labor Code provides that an employer, regardless of negligence, shall be liable for compensation for injury "sustained by his employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: * *

"(d) Where the injury is not caused by the intoxication of the injured employee." Under section 5705 intoxication is made an affirmative defense, the burden being placed upon the employer to prove it.

[7-9] There can be no doubt that this section denies recovery to the injured employee, or to his family, where the employee is killed, where the injury or death is caused by the voluntary intoxication of the employee. But the employer may, in a proper case, be estopped from asserting what otherwise would be a complete defense. Thus, the employer may be estopped by his actions from relying upon the statute of limitations. *Industrial Indem. Co. v. Industrial Acc. Comm.*, 115 Cal.App.2d 684, 252 P.2d 649; *Benner v. Industrial Acc. Comm.*, 26 Cal.2d 346, 159 P.2d 24. Where the facts warrant it, the same doctrine is applicable to the defense of intoxication. See, generally, *Satchell v. Industrial Acc. Comm.*, 94 Cal.App.2d 473, 210 P.2d 867.

[10-14] An employer is required by section 6400 of the Labor Code to furnish "em-

ployment and a place of employment which are safe for the employees", while section 6402 provides that: "No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe." Under these sections, if an employer in a factory offered drinks to and encouraged his employee to drink so that the employee got drunk, and then the employer ordered the employee to operate complicated machinery, and the employee was hurt, it would be perfectly obvious that the employer, by his actions, would and should be estopped to rely upon the defense of intoxication. Here the evidence most favorable to the petitioner shows that Allison asked the two men, including Tate, to accompany him to the Drake Bowl to watch him collect a bill, an invitation that hints, at least, at official duty. Then, knowing Tate's past weaknesses in reference to liquor, Allison, during working hours, purchased a round of drinks and participated in at least another round. Then, knowing that Tate had to drive on a main highway back to San Francisco, he again visited another bar with his two employees and again participated with them in at least several more rounds of drinks. Deardorff became so drunk that he has no recollection of any of the events after he and Tate left the bar to drive to Allison's home. Tate consumed so many drinks that shortly after leaving Allison's home he was driving most erratically and could not control the automobile. The quantity of alcohol in his blood and brain demonstrated that he was then intoxicated. Obviously, it is a possible and reasonable inference that Allison knew or should have known that Tate was intoxicated when he left his home. To send an intoxicated employee onto a busy highway in a company car is not furnishing him with a safe place in which to work. The proper rule is thus stated in Campbell, *Workmen's Compensation*, Vol. 1, page 203, section 211, as follows: "The Act imposes upon the employer the duty of supplying not only safe employment, *but a safe place of employment*. An important element of this duty is the maintenance of proper dis-

cipline. *If the employer permits intoxication, * * * or other dangerous practices amongst his employees, the results thereof are industrial injuries.* It is the tacit approval and consent of the employer to be inferred from the fact of his knowledge of these practices, and his failure to terminate them, which make the special hazard thereby involved incidental to his particular employment and, as such, a source of compensable injuries * * *." (Italics added.)

While no authorities are cited in support of the intoxication point, the rule is a common sense one and necessarily follows from a proper interpretation of the statutes to which reference has been made.

[15] Such a state of facts, if found to exist, would support a finding of estoppel. Such participation by the employer amounts to an implied representation that the employer will not hold it against the employee if he drinks, and will not deprive him of his job or of compensation benefits if he does so. The other elements of an estoppel are obviously present.

The petitioner contends that the evidence not only would permit but compels the finding of an estoppel. We do not think that this is so. We believe that justice requires that the issue of whether the employer was or was not estopped from relying upon the fact that Tate was intoxicated should be reheard by the Commission in a proceeding where both parties know what the issues are, and where they can produce all evidence that may be available to them. However, inasmuch as there was evidence that would have supported a finding of estoppel, had one been made, the Commission failed to find on a material issue. This necessitates annulling the award to permit the making of a proper finding in accordance with the views herein expressed.

The award is annulled.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

120 Cal.App.2d 617

PEOPLE v. GARRIS et al.**Cr. 4950.**District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of robbery in the first degree, and burglary in the second degree, and he appealed. The District Court of Appeal, McComb, J., held that Appellate Court will indulge all reasonable presumptions in favor of judgment and rulings of trial court, and will presume that proceedings were regular and free from error, and any alleged error will be disregarded when such presumption is not overcome by an affirmative showing by defendant by the record that prejudicial error occurred.

Affirmed.

1. Criminal Law $\S$ 260(11)

The question of the credibility of the evidence in a criminal case is one for the trier of fact.

2. Criminal Law $\S$ 1144, 1163(1)

In the absence of a showing in record to contrary, appellate court will indulge all reasonable presumptions in favor of judgment and rulings of trial court, and will presume that proceedings were regular and free from error, and in order to overcome such presumption, burden is upon appellant to show affirmatively by record that prejudicial error occurred.

Bernard Thomas Taylor, in propria persona.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

After trial before a jury, defendant Taylor was found guilty on 3 counts of robbery in the first degree, and 1 count of burglary in the second degree.

[1] Defendant does not question the sufficiency of the evidence to sustain the

verdicts of guilty, in fact, his attorney on a motion for a new trial conceded that the people had produced "overwhelming evidence" of defendant's guilt. Defendant merely argues the credibility of the evidence which was, of course, a question for the trier of fact. He does not attempt to point out any other error in the proceedings before the trial court. Therefore this rule is applicable: In the absence of a showing in the record to the contrary an appellate court will indulge all reasonable presumptions in favor of the judgment and rulings of the trial court, and will presume that the proceedings were regular and free from error.

[2] In order to overcome such presumption the burden is upon the appellant (defendant) to show affirmatively by the record that prejudicial error occurred, which error must be pointed out in the briefs of the complaining party. Otherwise any alleged error will be disregarded by this court. (See *People v. Cebulla*, 137 Cal. 314, 318 [5], 70 P. 181; *People v. Purcell*, 22 Cal.App.2d 126, 128 [2], 70 P.2d 706.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



120 Cal.App.2d 618

PEOPLE v. RESUM et al.**Cr. 4993.**District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1953.

Defendant was convicted in the Superior Court of Los Angeles County, Kenneth C. Newell, J., of robbery of the first degree, and he appealed. The District Court of Appeal, McComb, J., held that if there is any substantial evidence to sustain findings, an appellate court will not overturn them.

Judgment affirmed.

1. Criminal Law §1159(2)

Where there is any substantial evidence to sustain findings made by the trier of fact, they will not be interfered with by appellate court.

2. Criminal Law §1144

There is a presumption on appeal in criminal case that rulings of trial judge were correct and that proceedings were regular and free from error.

Bernard Thomas Taylor, in propria persona.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of robbery of the first degree, after trial before a jury, defendant Taylor appeals.

[1] Defendant does not contend that the evidence is insufficient to sustain the judgments of guilty. On the contrary defendant's attorney on the motion for a new trial conceded "the overwhelming evidence that the people" had produced of defendant's guilt. However, defendant argues on this appeal that certain of the evidence was conflicting and should have been disbelieved by the trier of fact. This, of course, cannot avail defendant in view of the well established rule in California that if there is any substantial evidence to sustain the findings of the trier of fact, an appellate court will not interfere with such findings. (*People v. Newland*, 15 Cal.2d 678, 681, 104 P.2d 778.)

[2] Since no other points are stated or argued, this court will presume that the rulings of the trial judge were correct and that the proceedings were regular and free from error. (*People v. Vivian*, 50 Cal.App. 2d 533, 537 [5], 123 P.2d 613; *People v. Purcell*, 22 Cal.App.2d 126, 128 [2], 70 P. 2d 706; *People v. Cebulla*, 137 Cal. 314, 318 [5], 70 P. 181.)

Affirmed.

MOORE, P. J., and FOX, J., concur.

PEOPLE v. TODD.

Cr. 4969.

District Court of Appeal, Second District,
Division 1, California.

Oct. 16, 1953.

Hearing Denied Nov. 12, 1953.

Defendant was convicted on two counts of information charging that defendant forged two wills with intent to defraud estate of deceased, on two counts charging that defendant prepared false evidence in form of purported wills, and on two counts charging that defendant offered forged wills to be filed of record. The Superior Court of Los Angeles County, William B. Neeley, J., entered judgment, and defendant appealed. The District Court of Appeal, Doran, J., held that convictions under the six counts did not violate rule against double jeopardy.

Judgment affirmed.

1. Criminal Law §1159(2)

Where there is substantial evidence to support judgment of conviction, an appellate court will not attempt to weigh or re-evaluate such evidence on appeal.

2. Forgery §44, 44(3)

Evidence sustained convictions on two counts charging that defendant forged two wills with intent to defraud estate of deceased, on two counts charging that defendant prepared false evidence in form of purported wills, and on two counts charging that defendant offered forged wills to be filed of record. Pen.Code, §§ 115, 134.

3. Criminal Law §741(1), 742(1)

Credibility of witnesses and weight of their testimony are questions of fact for jury in criminal case.

4. Criminal Law §200(5)

Conviction of defendant on two counts charging that defendant forged two wills with intent to defraud estate of deceased, on two counts charging that defendant prepared false evidence in form of purported wills, and on two counts charging that defendant offered forged wills to be filed of record, did not violate rule against double

jeopardy, on ground that there was but one offense for which defendant was convicted six times. Pen.Code, §§ 115, 134.

Albert J. Todd, in propria persona.

Edmund G. Brown, Atty. Gen., Alberta Gattone, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was convicted, after a trial by jury, on six counts of an information, in reference to the forgery, etc., of certain alleged testamentary instruments of Charles Babonet, deceased. Counts I and IV charge the defendant with forgery of a certain handwritten will dated May 26, 1941, and of a typewritten will of the same date, and the uttering and publishing of the same with intent to cheat and defraud the estate. Counts II and V charge the crime of preparing false evidence in the form of said purported wills, in violation of Section 134 of the Penal Code. Counts III and VI accuse the appellant of violations of Section 115 of the Penal Code, in offering the alleged false instruments to be filed of record.

As stated in respondent's brief, "Appellant's brief is in propria persona and * * appellant makes but one contention and that is that although the information charges six counts of violation of the Penal Code there was in fact only one offense and that he has been convicted six times for the same offense, and as to Counts Two, Three, Four, Five and Six he has been placed in double jeopardy". Certain other matters, raised by indirection in appellant's brief, will also be referred to.

[1-3] Appellant's assertion that the convictions are based upon insufficient evidence is answered by referring to the well-established rule that where there is substantial evidence in support of the judgment, an appellate court will not attempt to weigh or re-evaluate such evidence. In the case at bar the record discloses that the prosecution offered a chain of circumstantial evidence, coupled with the testimony of Clark Sellers, handwriting expert, which, if believed by the jury, abundantly supports the verdict

rendered. Credibility of the witnesses and the weight of such evidence are questions of fact, for the jury to determine, and in this case have been resolved against appellant's contentions.

Charles Babonet at the time of death was an elderly man, confined to a wheelchair, and lived in a small three-room house in the manner of a very poor man. An investigation of the house after Mr. Babonet's death revealed over \$130,000 in currency hidden on the premises, and the total estate was valued at some \$400,000. No will was found.

An article concerning Mr. Babonet's death appeared in the Sacramento Bee on August 17, 1950, at which time the defendant Todd was living in Sacramento. On August 25, 1950 the Public Administrator's office at Los Angeles received by mail the left-hand portion of a torn writing, the envelope being postmarked Sacramento, California. On September 30, 1950 the defendant delivered to Attorney Lawrence, at Sacramento, the right-hand portion of the same writing which purported to be the last will of Charles Babonet. Attorney Lawrence delivered the latter portion to the Public Administrator's office in Los Angeles. Both portions of this document, referred to as the "burned will", were pasted together and filed in the Probate Court.

At the time the right-hand portion was delivered to Lawrence, defendant stated that the burning away of the signature had occurred in a fire at Hotel Green in Sacramento on December 29, 1949. Attorney Lawrence was representing the defendant in reference to personal injuries and property damage sustained in such fire. The defendant stated that Mr. Babonet had torn the will in half, and that James Kelley, witness, Ferdinand Misner and Todd were together at that time. Attorney Lawrence testified that at that time no other will was mentioned by Mr. Todd. On March 19, 1951 the defendant petitioned for probate of this will through Los Angeles attorneys who were later substituted out of the case.

On July 9, 1951, a second purported will, typewritten and witnessed, and the subject matter of Counts IV, V and VI, was sent

by Todd to the Probate Court in Los Angeles, together with a folio of papers purporting to be a petition for probate and certain exemplars of handwriting. A third will, referred to as the green bordered will, also figured in the trial, but was never offered by Todd for probate. This green bordered will, procured by an investigator who saw the document protruding from a briefcase carried by appellant's attorney, "figured in this case", states respondent's brief, "only as a link in the chain of circumstances tending to show that all of the wills were forgeries".

All of the purported witnesses to both wills were dead with the exception of Mrs. Virginia Pierce (Todd), appellant's present wife, who was not produced as a witness. There was testimony by Ruby Adams (Todd), who married appellant in 1934 and separated in 1934-35, relating to the signing of a will in Breckenridge, Colorado in 1933 by a man named Babonet. This witness had not seen Todd from 1935 until February, 1951, and in reference thereto respondent says: "Her testimony was therefore utterly valueless for the purpose of proving the authenticity" of the two wills which were dated May 26, 1941. Moreover, on cross-examination it appeared that certain details of this story had been suggested to the witness by Mr. Todd.

The testimony of Clark Sellers, handwriting expert, is to the effect that the purported signatures of Charles Babonet were forgeries, traced from a signature on a promissory note which appellant had delivered to the probate court as a true exemplar of Babonet's writing; further, that this promissory note signature from which the tracings had been made was itself a forgery. According to Mr. Sellers' testimony, neither the alleged signatures of the testator nor those of the witnesses were the genuine writings of those persons. Respondent's brief also calls attention to the fact that the purported witnesses lived in or near Kelsey, California, the residence of Todd, although Babonet lived in Los Angeles.

[4] There is no merit in the appellant's contention that the convictions under six counts violate the rule against double jeop-

ardy, and that in fact there was but one offense for which appellant has been convicted six times. As hereinbefore indicated, the convictions relate to two separate forged wills. Not only was appellant properly charged with these two independent forgeries, but also with certain other separate crimes growing out of the same general subject matter but possessing different elements, and involving different sections of the Penal Code. There were two counts of forgery, two counts charging appellant with the crime of preparing false evidence in violation of Section 134 of the Penal Code, and two other counts alleging violations of Section 115 by offering to be filed of record the alleged false instruments.

As stated in respondent's brief, "the crime of forgery was complete in Counts I and IV when the wills were completed, provided there was an intent to defraud the estate or Babonet, without any intent to offer it for probate, or have it used as evidence. * * * The crime of offering the instrument for record, as prohibited by Penal Code Section 115, is an entirely *separate act* from that of forging it as prohibited by Section 470 of the Penal Code". There is nothing unusual in the situation here presented, involving forgery of two different testamentary instruments and other separate acts in connection therewith, denounced by the code sections referred to. Appellant was neither tried for the same offense six times, nor was there any violation of the rule against double jeopardy.

The record here presented shows nothing in support of appellant's assertions that there was a conspiracy between the officers of the law to secure a conviction, or that "the judge, and the district attorney showed a constant, striking, tenacious, aggressive disregard for defendant's unalterable, and inherent constitutional rights". On the contrary, it appears that the defendant was accorded a fair and impartial trial, that no prejudicial error occurred, and that the convictions are supported by competent and sufficient evidence.

The judgment is affirmed.

WHITE, P. J., and SCOTT, J., pro tem., concur.

120 Cal.App.2d 766

PEOPLE v. NARRON.**Cr. 5016.**District Court of Appeal, Second District,
Division 3, California.

Oct. 22, 1953.

Defendant was convicted of second-degree murder. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

I. Homicide ☞33

If homicide is on a sudden quarrel or heat of passion and without malice aforethought, homicide is voluntary manslaughter. Pen.Code, §§ 188, 192.

2. Homicide ☞254

Evidence sustained second-degree murder conviction of defendant who struck deceased with a shovel. Pen.Code, § 192.

Cletus J. Hanifin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Fred Smith Narron was convicted in a jury trial of the murder of Richard R. Brotherton, the offense being found by the jury to be murder of the second degree. His motion for a new trial was denied and he appeals from the judgment and the order.

Mr. and Mrs. Brotherton, Mr. and Mrs. Counts, and appellant and his wife, were neighbors in the town of Norwalk. San Antonio Drive extends north and south. The Narrons lived at number 12901. Their house fronted south and was located about 75 feet west of San Antonio on a paved driveway which extended east and west. About 100 feet west of the Narron house,

and beyond the westerly edge of the paved driveway, was a duplex, numbered 12903 and 12903½. The Brothertons lived in the north half of this duplex. Immediately south, and but a few feet away was another duplex, 12905, 12905½. Each duplex had two entrances which led to a sidewalk extending north and south. South of the paved driveway, distant about 20 feet therefrom, and equidistant from the Narron house and the Brotherton duplex, was number 12909 where Mr. and Mrs. Counts lived. East of their house was a lawn extending south from the paved driveway, and to the east of the lawn a dirt driveway which extended to San Antonio Drive.

There was evidence of the following facts: On the evening of June 1, 1952, Mr. and Mrs. Brotherton, with their small girl and their baby, visited at the Narron residence. At about 10:00 p. m. they went to the Counts' residence where they found Mr. and Mrs. Narron and Mr. and Mrs. Counts, who were drinking beer and watching television. Soon afterwards a son of the Narrons came in. The three men left for a time, the three women and the children remaining. After the men returned defendant put his hands on Mrs. Counts; she arose, rebuked him and told him to keep his hands off her, but defendant followed her and again put his hands on her. In a short time the men again left the house, went to town and returned with a bottle of whiskey from which Brotherton and defendant drank. While Mr. Counts was out of the room defendant took hold of Mrs. Counts and pulled her clothes up to the waistline. She pulled away and went into another room, returning with a car wrench. These occurrences were in the presence of Mrs. Brotherton and Mrs. Narron. Mr. Counts then took defendant outside and Brotherton followed. On the porch defendant spoke in derogatory terms of the women, saying that every woman had her price, and he suggested in indecent language that the men go look for other women. His statements were resented by Mr. Counts. The men went out to the Counts' car. There was loud talking. Mrs. Brotherton left the house and went across the lawn to

get her husband to leave. Defendant put out his foot and tripped her and she fell against the car and to the ground. Mr. Brotherton said: "Now, look what you did." Defendant and Brotherton started fighting. Defendant got Brotherton down and was hitting and choking him. Counts took hold of defendant and pulled him off Brotherton. Defendant turned around and said to Counts: "Oh, you are the fellow who bitched * * *" that he was "the son-of-a-bitch" who pulled him off Brotherton when he had him down, and he ran at Counts, struck him with his fist, breaking his nose. Brotherton arose and he and Mrs. Brotherton walked away. Counts held defendant's arms and when he let him loose defendant hurried to his house past the others. Mr. and Mrs. Brotherton walked to the paved driveway opposite the Narron house, Mrs. Brotherton preceding her husband. After they reached the paved driveway they turned toward their own house. Brotherton had no weapon or other object in his hand. Defendant came out of his house, called: "Hey, Richard"; Brotherton turned his head and defendant hit him in the face with a shovel, knocking out teeth and fracturing his skull. Defendant re-entered his house. Brotherton expired a short time afterwards in a hospital. On several occasions a few months before the fatal encounter defendant had made threats against Brotherton. He exhibited a gun to Mr. and Mrs. Counts and said that if Brotherton (applying a vile name) came onto the driveway he would kill him. He made similar threats and upon one occasion Mr. and Mrs. Counts took him into their house when he threatened Brotherton and said that he was going to "beat him up." Upon his arrest defendant admitted striking Brotherton with the shovel but denied having struck him during the fist fighting. His defense was that Brotherton was chasing him and that he struck in self-defense. The preponderance of the evidence was to the contrary.

The sole contention on the appeal is that the elements of murder were not proved and that the evidence established no more than the offense of manslaughter. The evi-

dence which we have summarized refutes this contention. Defendant was in an ugly mood and bent upon making trouble; his insulting treatment of Mrs. Counts and the tripping of Mrs. Brotherton were invitations to conflict. His previous threats disclosed his animosity toward Brotherton. Reasonable inferences were that when he was chided by Brotherton and Counts he started the fist fighting, and that his attack upon Counts was unprovoked. Both Brotherton and Counts were cut and bruised by defendant's fists. The actions of defendant clearly indicated that when the fist fighting was over and the Brothertons were on their way home, he hurried to his house to get a weapon. His conduct in calling to Brotherton and striking him when he turned around proved that he intended to attack him without giving him an opportunity to defend himself.

[1,2] If the killing was upon a sudden quarrel or heat of passion and without malice aforethought the offense would have been voluntary manslaughter. Pen.Code, § 192. Defendant says there was no substantial evidence of malice as defined by section 188, Penal Code, that is to say, there was no evidence of a deliberate intention to take away the life of Brotherton, and hence no evidence of express malice; also that there was considerable provocation for the act and that the circumstances of the killing did not show an abandoned and malignant heart; consequently there was an absence of evidence of implied malice. The jury concluded that defendant acted with malice aforethought and that conclusion has ample support in the evidence. His previous threats were evidence of a purpose to inflict bodily harm upon Brotherton; his quarrelsome and ugly state of mind before the conflict indicated that he was the aggressor in his fist fight with Brotherton, as he was in his encounter with Counts; his hurrying to get a dangerous weapon after the encounter was over and his brutal and unprovoked assault upon the unsuspecting and defenseless Brotherton was convincing proof of malice. A conclusion that defendant acted without malice would have been contrary to the reasonable

inferences which would follow from a dispassionate consideration of the evidence. There was considerably more evidence tending to prove evil motive and malice, and far less tending to show provocation, than was present in the case of *People v. Holt*, 25 Cal.2d 59, 153 P.2d 21, where it was held that the evidence warranted a conviction of murder of the second degree. Defendant was justly convicted of that offense.

The judgment and the order are affirmed.

PARKER WOOD and VALLÉE, JJ.,
concur.



120 Cal.App.2d 602

SHELLEY v. NICHOLS.

District Court of Appeal.
Third District. California.
Oct. 13, 1953.

Action by executor of decedent's will against decedent's surviving husband for construction of property settlement agreement executed by decedent and husband while they were husband and wife but living apart. The Superior Court, Siskiyou County, James M. Allen, J., decreed that obligations of husband to make the payments stipulated in agreement ceased on death of wife, and executor appealed. The District Court of Appeal, Van Dyke, P. J., held that the agreement, whereby husband agreed to pay wife a certain sum per month as a property settlement until wife reached age of 65, was properly construed as requiring no further payments on the part of husband upon wife's death nine years before she reached age of 65, in view of parol evidence as to circumstances surrounding execution of agreement and as to conduct of parties under it, properly received because of ambiguity of agreement.

Judgment affirmed.

1. Evidence ⇨448, 461(1)

Where language used in contract is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify terms of agreement but to aid court in ascertaining true intent of parties, not to show that parties meant something other than what they said, but to show what they meant by what they said.

2. Contracts ⇨169, 170(1)

Where any doubt exists as to purport of parties' dealings as expressed in wording of their contract, court may look to circumstances surrounding its execution, including the object, nature and subject matter of agreement, as well as to subsequent acts or declarations of parties shedding light upon question of their mutual intention at time of contracting.

3. Evidence ⇨461(1)

Property settlement agreement, executed by husband and wife who were living apart, whereby husband agreed to pay wife a certain sum per month until wife reached age of 65, was ambiguous in respect to whether it required that such payments continue until such time as wife would have reached age of 65 had she lived, and resort to parol evidence to determine intention of parties was proper.

4. Husband and Wife ⇨279(4)

Property settlement agreement, executed by husband and wife who were living apart, whereby husband agreed to pay wife a certain sum per month until wife reached age of 65, was properly construed as requiring no further payments on part of husband upon wife's death nine years before she reached age of 65, in view of parol evidence as to circumstances surrounding execution of instrument and conduct of parties under it, properly admitted because of ambiguity of agreement.

Barr & Hammond, Yreka, for appellant.
Hancock, Elkington & Rothert, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff-appellant is the executor of the will of Helene I. Nichols and defendant-

respondent is her surviving husband. On March 6, 1945, and while they were husband and wife and living apart, they executed a document entitled "Property Settlement Agreement". Various dispositions of property were therein made, but we are mainly concerned on this appeal with the meaning of a paragraph reading as follows: "Husband agrees to pay wife commencing June 1, 1945, the sum of \$25.00 per month as and for a property settlement until wife reaches the age of sixty-five (65) years. This payment is not made as alimony and is to be made by husband to wife regardless of whether or not she remarries." The wife died about nine years before she would have reached the age of 65 years and respondent has refused to make payments under said paragraph to appellant, claiming that the agreement does not require him to do so.

This action was brought by appellant to have the paragraph of the contract in issue construed, claiming that it required that the payments continue until Mrs. Nichols would have reached the age of 65 had she lived. The trial court, deeming the language of the contract sufficiently uncertain to justify it, received evidence as to the circumstances surrounding the execution of the instrument and as to the conduct of the parties under it. The court decreed that the obligations of respondent to make the stipulated payments ceased on the death of the wife. Plaintiff appeals.

[1,2] Appellant contends that it was error to receive evidence other than the writing, but with this contention we cannot agree. We think the language used was susceptible of the construction given to it by the court or of the contrary construction contended for by appellant and therefore it was proper for the court to receive the evidence objected to.

"* * * When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties * * *, not to show that 'the parties meant something other *than* what they said' but to show 'what they

meant by what they said' * * *. Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement * * *—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting' * * *." *Barham v. Barham*, 33 Cal. 2d 416, 422, 423, 202 P.2d 289, 293.

[3,4] In support of what has been said attention is called to the following with respect to the language of the instrument: It is not specifically stated that the payments are to continue beyond the death of the wife; it is not specifically stated that any sum certain in gross is to be paid; it is stated that the payments are to be made *to the wife* and the benefits of the obligation do not in terms run to her heirs or assigns; there was a division of property, each party receiving part of what the two owned and it was stated that the monthly payments were not to be considered as alimony but were made as a part of a property settlement. From these things we think that the question of the meaning of the contract is fairly susceptible to either of the two constructions contended for and that it was necessary and proper for the court to resort to parol evidence. When this evidence was received the following appeared: The wife both before and after the execution of the agreement had declared that she insisted upon the monthly payments provided for in the agreement in order to assure her support until she attained the age of 65 years, at which time she would be eligible for old-age pension and would not need this aid. She further stated that she did not want the payments for her maintenance to be referred to as alimony as she objected to that term. The attorney who drafted that agreement corroborated this testimony, but stated further that the effect of the wife's death prior to her attaining the age of 65 was not specifically discussed. Appellant introduced evidence, saving his objections

that the issue was not the proper subject of parol testimony, to the effect that the wife had stated that the husband had squandered her money and that reimbursement thereof was the purpose of the monthly payments. When the instrument is considered in connection with the parol evidence received we think there was presented to the trial court a question of fact as to its meaning, and that the trial court has resolved this upon evidence which substantially supports its conclusion.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.



120 Cal.App.2d 671

BLAKE v. PUBLIC UTILITIES COMMISSION OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15571.

District Court of Appeal, First District,
Division 2, California.

Oct. 19, 1953.

City employee, who was dismissed by appointive officer, brought certiorari proceedings against the Public Utilities Commission of the City and County of San Francisco and others to review order of dismissal. The Superior Court of the State of California, in and for the City and County of San Francisco, Wm. T. Sweigert, J., entered judgment dismissing the proceedings, and city employee appealed. The district Court of Appeal, Nourse, P. J., held that city employee was not entitled to maintain certiorari because of his failure to exhaust administrative remedies by appealing to Civil Service Commission.

Judgment affirmed.

1. Certiorari ⇨5(1)

A writ of review does not lie if remedy by appeal is available. Code Civ.Proc. § 1068.

2. Administrative Law and Procedure ⇨229

Administrative remedies must be exhausted before redress may be had in the courts. Code Civ.Proc. § 1068.

3. Municipal Corporations ⇨218(9)

Where city charter provided that finding of appointive officer that city employee should be dismissed shall be final unless employee appeals to Civil Service Commission within thirty days after dismissal, dismissed employee, who did not appeal to commission within thirty days, was not entitled, because of failure to exhaust administrative remedies, to maintain certiorari to review order of dismissal, even though there was an alleged absence of any competent evidence to support finding of appointive officer, since alleged absence of competent evidence did not cause decision of appointive officer to be in excess of jurisdiction and void. Code Civ.Proc. § 1068.

4. Administrative Law and Procedure ⇨659

Though complete absence of supporting evidence causes decision of administrative officer to be reviewable by certiorari, if all other conditions for review are fulfilled, such decision is not absolutely void. Code Civ.Proc. § 1068.

5. Certiorari ⇨5(1)

When appeal lies from a void judgment or order, certiorari is not available whatever the character of the invalidity. Code Civ.Proc. § 1068.

Albert E. Polonsky, San Francisco, for appellant.

Dion R. Holm, City Atty., A. Dal Thomson, Public Utilities Counsel, Jack G. McBride, Deputy City Atty., San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an appeal from a judgment dismissing certiorari proceedings on the ground that the order sought to be reviewed was an appealable order.

Appellant's petition for a writ of review filed March 24, 1952, alleged in substance that he was employed as a general clerk-stenographer for the Municipal Railway of

San Francisco, that on December 14, 1951, he received notice from the Public Utilities Commission of said City and County that charges had been preferred against him for inattention to duties; that on January 10, 1952, a hearing was held before J. H. Turner as hearing officer for said commission and that said J. H. Turner on January 16, 1952, discharged petitioner for inattention to duties; that there was no competent evidence whatever of such inattention to duties, and that therefore the discharge was in excess of jurisdiction and should be overruled.

It is undisputed that appellant's discharge is governed by section 154 of the Charter of the City and County of San Francisco, that under said section J. H. Turner as appointing officer had jurisdiction to hear and determine the charges presented, that said section contains among others the provision: "The finding of the appointing officer shall be final, unless within thirty days therefrom the dismissed employee appeals to the Civil Service Commission" and that appellant did not take any appeal to said commission.

[1-3] A writ of review does not lie where remedy by appeal is available, sec. 1068, Code Civ.Proc., but, whether the administrative appeal of section 154, *supra*, be considered an appeal in the sense of section 1068, Code of Civil Procedure, or not, it is at any rate established in this state as a fundamental rule that administrative remedies must be exhausted before redress may be had in the courts. *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 291 et seq., 109 P.2d 942, 132 A.L.R. 715; *Alexander v. State Personnel Board*, 22 Cal.2d 198, 137 P.2d 433. Appellant contends that this rule does not apply in his case because the alleged absence of any competent evidence to support the decision causes the decision to be in excess of jurisdiction and therefore absolutely void and subject to collateral attack at any time. In this he is mistaken.

[4,5] The excess of jurisdiction which, if other requirements are fulfilled, can be reviewed by means of certain writs covers a much wider field than the lack of all judicial authority or lack of jurisdiction over

the person or over the subject matter which completely invalidates a judgment and under certain conditions subjects it to collateral attack. 10 Cal.Jur.2d 54 et seq. Although complete absence of supporting evidence causes a decision to be reviewable by certiorari if all other conditions for such review are fulfilled, 10 Cal.Jur.2d 61, sec. 16, such decision is not absolutely void. Moreover even the remedies available against an absolutely void judgment or order may well be limited. Thus, when appeal lies from a void judgment or order, certiorari is not available whatever the character of the invalidity. See *Phelan v. Superior Court*, 35 Cal.2d 363, 217 P.2d 951. With respect to exhaustion of administrative remedies itself, it is said in *United States v. Superior Court*, 19 Cal.2d 189, 194, 120 P.2d 26, 29: "The respondents apparently contend that the requirement of exhaustion of administrative remedies applies only to erroneous orders and does not preclude judicial interference where, as here, an order is assailed as a nullity because illegally adopted and where the agents for enforcement appointed thereunder are charged with being mere pretenders claiming powers which they do not lawfully possess. But there is no substantial difference, in so far as the necessity for resort to administrative review is concerned, between an erroneous order and one which, it is claimed, is being executed in violation of statutory authority." However in *Security-First Nat. Bank v. County of Los Angeles*, 35 Cal.2d 319, 321, 217 P.2d 946, it is said that as to a taxpayer seeking judicial relief from an erroneous assessment an exception to the requirement of exhaustion of administrative remedies is made when the attempted assessment is a nullity because the property is either tax exempt or outside the jurisdiction. On this and similar cases 2 Cal. Jur.2d 307, 308, bases the following general statement: "The courts recognize a distinction between administrative action which is beyond the scope of its power or is a nullity in any event, and action which may be invalid because of defects growing out of the administrative process. Thus, where the agency acts wholly without jurisdiction, its action is void, and the doctrine of ex-

haustion of administrative remedies does not apply. But where the issues could have been raised and possibly disposed of during the administrative process, the exception is not applicable." We need not investigate whether this statement is correct in its generality and how it relates to the quoted language of *United States v. Superior Court*, *supra*, because even if the distinction made is correct there can be no doubt that the lack of all supporting evidence would be a defect in the administrative process, which could have been raised on the administrative appeal and which does not involve total lack of jurisdiction. Appellant should have exhausted his administrative remedy before resorting to court action.

Judgment affirmed.

GOODELL, J., concurs.



120 Cal.App.2d 608

Ex parte WHITTON.

Cr. 2448.

District Court of Appeal, Third District,
California.

Oct. 14, 1953.

Habeas corpus proceeding by which petitioner sought to have his status as an habitual criminal fixed. The District Court of Appeal, Van Dyke, P. J., held that terms served consecutively without any intermediate release from prison constitutes separate terms within the meaning of the habitual criminal statute.

Petition denied.

1. Criminal Law ⇨1202(7)

Erroneous recital in information charging three prior convictions, as to date of a prior conviction, was not prejudicial when record disclosed that petitioner had in fact been convicted of the crime recited and petitioner had, upon arraignment, ad-

mitted all charges as to prior convictions, and that he had thereafter made no claim of having been deceived or misled by the erroneous date. Pen.Code, § 644.

2. Criminal Law ⇨1202(1)

The service of a "term" within meaning of provision of habitual criminal statute declaring that one who shall have been previously thrice convicted upon charges separately brought and tried, and who shall have served separate terms therefor for named felonies, shall be adjudged an habitual criminal, includes part of a term as well as a full term. Pen.Code, § 644.

See publication Words and Phrases, for other judicial constructions and definitions of "Term".

3. Criminal Law ⇨1202(1)

Terms served consecutively without any intermediate release from prison constitute separate terms within the meaning of provision of habitual criminal statute declaring that one who has been previously thrice convicted upon charges separately brought and tried, and who shall have served separate terms therefor, for named felonies, shall be adjudged an habitual criminal. Pen.Code, § 644.

James E. Whitton, in pro per.

Edmund G. Brown, Atty. Gen., by Gail Strader, Deputy Atty. Gen., Sacramento, for respondent.

VAN DYKE, Presiding Justice.

[1] Petitioner seeks through habeas corpus proceedings to have his status as an habitual criminal fixed, he contending that upon the record of his conviction the trial court was without jurisdiction to declare him an habitual criminal, with three prior convictions. While not contending that two of these prior convictions were not valid priors within the meaning of Section 644 of the Penal Code he does contend that this Court should declare his status to be that of one having suffered two priors only. Petitioner was informed against for the commission of robbery. He was convicted therefor, the degree being fixed at first degree. It was further charged that he had

previously been three times convicted of felonies mentioned in the code upon charges separately brought and tried and that he had served separate terms therefor. He was adjudged to be an habitual criminal. The information charged, as to one of these convictions, that it was for the crime of assault with intent to kill suffered by petitioner in Hamilton County, Ohio, on or about June 15, 1932. Petitioner admits that he was convicted of such a crime in that county and state, but asserts that the conviction occurred in April, 1923, instead of June 13, 1932, as charged. It is quite apparent from the record filed herein that the date of the subject conviction as charged in the information was wrong and that in fact the same occurred April 4, 1923. There is no doubt as to petitioner having been convicted for said crime in said county and state. Upon arraignment petitioner admitted all charges as to prior convictions, and he does not claim to have been in fact deceived or misled by the erroneous date appearing in the information. Under such circumstances the error in date is not prejudicial.

[2] Petitioner contends further that he did not serve separate terms in respect of two of the priors. The meaning of the word "term" as used in the code section has been judicially established.

"* * * It is well settled that the service of a 'term' within the meaning of § 644 of the Penal Code includes part of a term as well as a full term. In *People v. Carkeek*, 35 Cal.App.2d 499, at page 502, 96 P.2d 132, at page 134, it is stated: '* * * it is urged that the Habitual Criminal Act (§ 644 of the Penal Code), provides not only that the prior conviction must be proved, but that the defendant served a "term". * * *. While appellant plead guilty to having been convicted and having served a term upon each of the prior convictions charged, he admitted later, in answer to questions propounded by the trial court, that he escaped from one of the prisons. He urges, therefore, that he did not actually serve a "term". But the legislature

does not require that a *full term* be served, and a reasonable construction of the word would seem to be any period of time, otherwise, a premium would be placed upon the act of escape.' See, also, *People v. Keilly*, 54 Cal.App. 2d 764, 129 P.2d 939; *People v. Martin*, 78 Cal.App.2d 340, 177 P.2d 813; *In re Brady*, 5 Cal.2d 224, 53 P.2d 945." *People v. Mangan*, 87 Cal.App.2d 765, 767-768, 197 P.2d 781, 782.

[3] Notwithstanding the foregoing definition of "term", however, it is contended here that terms served consecutively without any intermediate release from prison do not constitute separate terms within the meaning of the code section. This contention, too, is answered by *People v. Mangan*, supra. There appellant, while serving a sentence, had been released on parole. He committed another felony for which he was convicted and sentenced for a term to be served in part concurrently with the one he was then still serving. There was an overlap of 12 days, he being discharged from the first sentence 12 days after the last sentence began. It was held that notwithstanding there was no intermediate release from prison still the remainder of the last term constituted a separate term within the meaning of the section. That ruling applies here.

It appears that appellant had been convicted of robbery in Ohio. While in jail awaiting trial he escaped and in doing so injured a guard. He was charged with assault with intent to kill and was retained in jail until tried and convicted on this latter charge. In effect, his sentences were to run consecutively. The records of the Ohio prison show that he was received on April 6, 1923, and, at the expiration of his sentence for robbery, he was "released to new sentence and number" under the second conviction of assault to kill. He, therefore, served separate terms within the meaning of Section 644 of the Penal Code and his status is that of one who has suffered three prior convictions.

Petition for writ is denied.

PEEK and SCHOTTKY, JJ., concur.

120 Cal.App.2d 645

RAICHART v. PHILLIPS.

Civ. 4806.

District Court of Appeal, Fourth District,
California.

Oct. 16, 1953.

Rehearing Denied Nov. 9, 1953.

Hearing Denied Dec. 10, 1953.

Action to recover value of 320 shares of stock which defendant had agreed in writing to pay decedent for promotional services. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment from which defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that intent and purpose of agreement was to compensate decedent for services rendered in connection with promotion of the corporation, and not merely to provide him an instrument on which he might procure a loan, and that agreement was supported by sufficient consideration.

Judgment affirmed.

1. Corporations ⇨121(5)

In action to recover value of 320 shares of stock which defendant had agreed in writing to pay decedent for promotional services rendered, wherein defendant contended that writing was never intended to be an agreement of such character, but that it had in fact been executed to enable decedent to obtain a loan with which to purchase stock from other stockholders, evidence justified finding that agreement was executed with purpose and intent to give decedent right to receive 320 shares of stock, when issued to defendant, for promotional services rendered by decedent.

2. Corporations ⇨121(5)

In action to recover value of 320 shares of stock which defendant had agreed in writing to pay decedent for promotional services rendered, wherein it was contended that agreement was not supported by any consideration in that all the stock of corporation was sold prior to execution of contract and that a past consideration would not be sufficient in absence of a preexisting legal obligation, evidence sustained finding

that a sufficient consideration did in fact exist for the agreement, by virtue of a preexisting legal obligation and subsequent services as well as past services performed.

3. Corporations ⇨121(5)

In action to recover value of 320 shares of stock which defendant had agreed in writing to pay decedent, wherein defendant contended that parties had subsequently entered into an oral agreement cancelling the written agreement, evidence warranted finding that there had in fact been no oral contract of rescission.

4. Appeal and Error ⇨1052(5)

In action to recover value of 320 shares of stock which defendant had agreed in writing to pay decedent for promotional services, admission of evidence of other transactions in which defendant and other parties were involved at approximately the same time, even if improper, was not prejudicial error in view of evidence showing clear right of decedent's executrix to recover on the agreement.

Eugene M. Elson, Los Angeles, for appellant.

Glenn A. Lane, Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for breach of contract, with a second count for conversion, involving the right to 320 shares of corporate stock.

The defendant Phillips promoted three oil companies, being president of each, the Phillips-Ramsay Oil Company in 1946, the Nelson Phillips Oil Company in 1947, and the Gordon Oil Company in 1949. He became acquainted with the decedent, Dr. Raichart, in 1946, they saw each other frequently, and Dr. Raichart bought stock in all three companies. Phillips organized the Gordon Oil Company in January, 1949. A permit was issued in March, 1949, authorizing the issuance of 13,000 shares of stock to Phillips and the sale of an additional 13,000 shares at a par value of \$10, and providing that all shares should be held

in escrow and that Phillips should receive no dividends on his shares until the purchasers of shares for cash had been reimbursed for the full purchase price.

In August, 1949, Phillips and Dr. Raichart executed an agreement reading as follows:

"San Diego, Calif.

"August 18th 1949

"For promotional services rendered by G. W. Raichart I, N. Gordon Phillips hereby agrees to give when received from escrow, or order of the Corporation Commissioner, and G. W. Raichart hereby agrees to accept as payment in full for his promotional services, a total of 320 shares of Capitol stock of the Gordon Oil Company when issued to N. Gordon Phillips as authorized under the terms of its permit, with the corporation Department of the State of California and pursuant to all covenants, conditions and terms of said permit, governing all stock when issued to N. Gordon Phillips.

"The undersigned hereby certifies that he further agrees to accept and be bound by all the provisions of the order of the Commissioner of Corporations of the State of California, contained in said permit when the stock is issued to

"Signed N. Gordon Phillips

"Accepted G. W. Raichart"

Dr. Raichart died suddenly on December 27, 1950. Shortly thereafter, Phillips put through a transaction by which one Kline purchased all of the stock of the Gordon Oil Company. The deal was closed in March, 1951, and Phillips received about \$2,000,000 for his shares of stock.

The widow of Dr. Raichart, as executrix of his will, brought this action to recover the value of the 320 shares. The defendant's answer admitted the execution of the agreement and that none of the shares had been delivered to or for the decedent. As defenses, it was alleged that this instrument was never intended to be an agreement and is void; that it was executed

without consideration; and that the written agreement had been cancelled and extinguished by an oral agreement between the parties. The court, sitting without a jury, found in all material respects in favor of the plaintiff finding, among other things, that on the date of his death the decedent was entitled to 320 shares of Gordon Oil Company stock when released by the Corporation Commissioner; that on January 24, 1951, Phillips sold said shares and converted them to his own use and received the proceeds in the amount of \$49,920; and that the reasonable value of said shares on that date was \$49,920. Judgment was entered for that amount with interest from that date. A motion for a new trial was denied, and this appeal followed.

Appellant's main contentions are that this agreement, which was admittedly typed by him in Dr. Raichart's office and signed by both parties, was never intended to be an agreement and is void; that it was not supported by any consideration; and that it was cancelled by an oral agreement made about a week later. Conceding that it would be futile to argue these three points if the evidence relating thereto was conflicting, or such that conflicting inferences could lawfully be drawn, the appellant argues that there was no conflict in the evidence, that no reasonable inferences could be drawn which would support the findings, and that such findings are based entirely on surmise and conjecture.

The only persons present when the agreement was executed were Dr. Raichart and the appellant. In his testimony the appellant admitted his close association with Dr. Raichart since 1946; his sale of stock in the various companies to Dr. Raichart, his employees and office associates and members of his family; that he himself was hard pressed for money at times; and that Dr. Raichart had loaned him money at various times during this period although he said he had repaid all these loans except one of \$2,500, which he still owed. While he testified that this loan was made in cash and not by a check, there is evidence indicating that other such loans were made by checks, which were produced at the trial.

With respect to the making of the agreement in question Phillips testified that in April, 1949, Dr. Raichart told him he would like to get some stock in the Gordon Oil Company; that he told the doctor that all of that stock had been sold and none was available; that early in August, Dr. Raichart again asked about obtaining stock and the witness told him that several wells were producing and paying dividends, and that the only stock obtainable would be that of some stockholder who might be willing to sell; that the doctor asked him to see if he could buy some and he replied that he would; that on August 18 he was in Raichart's office and Raichart asked if he had found any one willing to sell their shares; that he told Raichart he had heard of some sales at around \$100 a share and he would get some if he could; that Raichart replied that he did not have that amount of money and would have to borrow some, and that he would like to have a paper to show possible lenders that he was entitled to a certain number of shares; that the witness then wrote this agreement, leaving the number of shares blank; that the next day Raichart decided that he wanted 320 shares and Phillips filled in that number in the blank space, and both of them signed the agreement.

Phillips further testified that a week or ten days later in Raichart's office Raichart told him he would be unable to go through with the deal; that he mentioned the fact that he owed Raichart \$2,500 and offered to repay it, but Raichart refused to accept it at that time; that he then suggested that Raichart return the agreement to him and Raichart told one of his assistants to bring it from his safe; that she returned in a few moments and said she could not find it; that he remarked that it would show up some day and Raichart could give it to him; that a few days later he returned and asked if the agreement had been found and Raichart replied that it had not; that Raichart called in his nurse and told her to look for the agreement; that she was unable to find it; that Raichart said it would probably show up some day and he would get it for Phillips; and that he later saw Dr. Raichart on innumerable occasions prior to his death.

When asked why he had not used more appropriate language, if the purpose of the agreement was to enable Raichart to borrow money on it, Phillips replied that the reason he worded the agreement as he did was that neither he nor the doctor knew "what we were going to have to pay for the stock"; and that "so I just used that as a substitute there that would fill the bill." When asked with reference to the language "for promotional services rendered", he replied that Raichart had at no time performed services of any kind for him prior to or after the execution of the agreement. When asked why he had provided that the stock he agreed to give Raichart in full payment for services was to be delivered after it was issued to Phillips rather than to Raichart, he replied that he wanted to keep the amount of outstanding cash shares as low as possible, since he could receive no dividends until all cash purchasers had received their investment in full.

The appellant's testimony with respect to the purpose of the agreement in question is far from satisfactory, especially in view of the fact that the lips of the other party to the agreement are sealed by death. The appellant was a man of wide business experience and it seems unbelievable that he would execute such an agreement, agreeing to personally convey a definite number of shares, for the express purpose of misleading others into lending money to Raichart to enable him to buy shares owned by other stockholders, or to do this at a time when it was not known whether or not that number of shares, or any number, would be available. It is also strange that Raichart would say he did not have "that amount of money", before any number of shares was decided on or even discussed. The fact that neither party knew what price would have to be paid for such other stock, if any might be found, fails to explain the language used in the agreement. The reason given for providing that the shares be first issued to Phillips is not very plausible. If Raichart should succeed in buying cash shares from other stockholders, they would still remain cash shares. The language of the agreement clearly indicates that it referred to stock in escrow which was owned and

controlled by Phillips and the various explanations offered by Phillips tend to strengthen that conclusion rather than weaken it.

[1] The appellant testified at great length and he not only contradicted himself but was impeached in a number of respects. His testimony as a whole would tax anyone's credulity, and amply discloses why it was not believed by the court. At the time this instrument was executed the parties did not know whether that amount of stock, or any amount other than that controlled by the appellant, was available, and there is strong evidence that at that time Raichart had liquid assets which were sufficient to have enabled him to buy that amount of stock without the necessity of using such a pretext for the purpose of borrowing money. It further appears, without conflict, that the appellant then owed Raichart \$2,500 for borrowed money; that this written agreement was found in Raichart's safe after his death and removed by his sister; and that shortly thereafter the appellant offered the sister \$7,500 to return the paper to him. In explaining this offer the appellant testified "I said to myself, here is a paper that on its face would indicate that I owed something * * * and here it crops up in Leona's possession." He further testified that he was willing to give two or three times the amount of the loan to the sister because she and her mother needed the money. This instrument itself was evidence, its execution was admitted, and the evidence relied on by the appellant merely created a conflict. The evidence as a whole, including appellant's testimony, justifies and sustains the court's findings and conclusion with respect to the purpose and intent with which this agreement was executed. Reasonable inferences may be drawn from the evidence in support of the findings, and it cannot be said that any such inferences amount to nothing more than surmise and conjecture.

[2] The appellant contends that this agreement was not supported by any consideration, arguing that since all the stock of the corporation was sold prior to the execution of the contract there could be no

promotional services for Raichart to perform thereafter; that a past consideration would not be sufficient in the absence of a preexisting legal obligation; and that there is no evidence that the loans previously made to Phillips by Raichart had anything to do with the making of the agreement in question.

The agreement in question recites a consideration indicating services and assistance in attempting to make this corporation a success. Assuming that all of the stock was sold, many things remained to be done, and there is some indication of a preexisting obligation. There is evidence justifying the inference that Raichart was of assistance to Phillips both before and after the date of the agreement; that he cooperated with Phillips to a rather large extent over this entire period; and that he was instrumental in the sale of stock to his business associates and family. Phillips was admittedly hard up for money at times during this period and Raichart had admittedly loaned him large amounts at various times, which must have been of great assistance to him. While Phillips said that he had repaid all of these loans except one for \$2,500, there was no proof of that fact other than his word. He testified that he kept no records, that he paid the loans in cash and not by check, and that he neither asked for nor received receipts. There is evidence that Raichart furnished to Phillips or his companies a total of \$18,200 over this period. While this was shown by checks issued by Raichart, the records found by his estate failed to disclose what more than half of these payments were for. The evidence does not show that of this amount \$6,900 was paid to Phillips personally prior to August 18, 1949, and \$4,000 was paid to him personally in January and February of 1950, after the contract was executed and long before the project had developed to a point making Phillips' sale of the entire corporation possible. It also appears that during this period Phillips had sold stock in these various companies to six or seven people in Raichart's office, and also to the doctor and five of his relatives. It is unnecessary to review the argument made with respect to certain technical distinc-

tions in connection with the matter of consideration, which have been held applicable under some circumstances. The evidence is sufficient to support the court's finding that a sufficient consideration here existed.

[3] The appellant further contends that the evidence shows, without conflict, that these parties, about a week later, entered into an oral agreement cancelling the written agreement. The appellant so testified, and a nurse formerly employed in Dr. Raichart's office testified that on one occasion, when Phillips was present, the doctor asked her to try and find the agreement and she was unable to do so. The agreement was in writing, and admittedly was executed and delivered. Appellant's evidence created a conflict, and the burden was upon him to establish the oral contract of rescission to the satisfaction of the court. The trial judge did not believe appellant's evidence in this regard, and the circumstances support him in that conclusion. Having been made for another purpose, as found by the court, this agreement would naturally not be cancelled for the reason relied on by the appellant. Raichart had kept the contract in his safe, and it was found there after his sudden death, nearly a year and a half later. It is hardly reasonable to believe that Phillips would have left so important a matter in that condition, without securing an adequate release of the agreement, if the parties had actually agreed on its cancellation. The evidence, with the reasonable inferences, supports the findings in this connection. This is especially true in view of the unsatisfactory nature of Phillips' testimony, of his willingness to pay \$7,500 to get the contract back, and of the fact that the only other party to the agreement is dead.

[4] Finally, the appellant contends that the court erred in admitting evidence of

other transactions in which Phillips and other parties were involved at about the same time. It is argued that these were admitted to show a course of conduct by Phillips to violate his agreements; that these transactions did not involve finally adjudicated matters; that some of them were matters which were compromised and disposed of by settlement; and that none of such evidence was relevant to the questions in dispute in this case. It would serve no useful purpose to review the evidence in connection with these various transactions. Some of them disclosed that Phillips had been a little loose in keeping his contracts, and that in some cases he had used pressure to force a settlement. These matters all related to transactions in connection with these three oil companies, and most of them in connection with the Gordon Oil Company. Some of this evidence was admitted without objection, and much of it was relevant to the issues in this case. It appears from some of this evidence that Phillips had, at about the same time, settled his debts and obligations to others by giving them an interest in his promotional stock in the Gordon Oil Company, which was being held in escrow. Assuming that portions of this evidence should not have been admitted, no prejudice appears. *Spolter v. Four-Wheel Brake Serv. Co.*, 99 Cal.App.2d 690, 222 P.2d 307. Under the evidence as a whole, and especially in view of the nature of the appellant's own testimony, it would be unreasonable to think that any error in this connection could have affected the result. After reading the entire record we do not see how any court could reasonably be expected to set aside this written agreement.

The judgment is affirmed.

GRIFFIN, J., concurs.

120 Cal.App.2d 606

ERICKSON v. BOHNE et al.

Civ. 8504.

Sac. 6431.

District Court of Appeal.

Third District. California.

Oct. 13, 1953.

Action against grantees to recover the amount subsequently received on sale of property that grantor alleged was conveyed by her, without consideration, while she was incapable of transacting business. The Sonoma County Court denied grantees' motion for change of venue and grantees petitioned for writ of supersedeas pending appeal. The District Court of Appeal, Van Dyke, P. J., held that record and petition of grantees established that there was a substantial question as to whether grantees were entitled to have action tried in their county of residence, which entitled defendants to writ of supersedeas.

Writ granted.

1. Appeal and Error ⇐479(1, 2)

The issuance of a writ of supersedeas is discretionary, and writ will only issue on a showing that a substantial question will be presented upon the appeal from the order denying a change.

2. Venue ⇐4

Complaint which alleged plaintiff was the owner of real property within a certain county, that defendants took advantage of plaintiff to procure delivery of deed, and that defendants recorded deed, and through system of conveyances conveyed to subsequent grantee for consideration, and prayed for judgment for amount of consideration paid to defendants, stated a transitory cause of action.

3. Venue ⇐22(3)

The joining as a party defendant of one against whom no cause of action is stated does not deprive the other defendants of the right to have the action tried in the county of their residence. Code Civ.Proc. § 395.

4. Appeal and Error ⇐479(1)

In action against grantees to recover amount subsequently received by grantees

on sale of property that grantor alleged was conveyed by her, without consideration, while she was incapable of doing business, on appeal from order denying change of venue, record and petition of grantees established that there was a substantial question whether defendants were entitled to have action tried in the county of their residence, rather than in the county where the land was located and where the subsequent grantee lived, and that defendants were entitled to a writ of supersedeas.

Stanley R. Sterne, Oakland, for appellants.

S. K. McMullin, Santa Rosa, for respondent.

VAN DYKE, Justice.

[1] Defendants Edrie Mary Bohne, James L. Meegan and Beatrice Meegan have appealed from an order of the trial court denying their motion for a change of venue upon residential grounds. They now seek a writ of supersedeas pending the disposition of their appeal. The issuance of such a writ is discretionary and the writ will issue only when justified by a showing that substantial questions will be presented upon the appeal from the order denying a change. *Bardwell v. Turner*, 219 Cal. 228, 25 P.2d 978. A consideration of the petitioners' moving papers here have satisfied us that they have good ground for asking the issuance of the writ they seek.

[2] The complaint filed by plaintiff and respondent in the trial court contained two counts and named the four defendants as parties to each count. The three petitioners reside in Alameda County. The fourth defendant who neither appeared nor joined in the motion for change, nor yet appealed from the order denying it, resides in Sonoma County where the action was begun. In one count plaintiff seeks to recover from the three defendants, who are petitioners here, a money judgment in the sum of \$4,500 and in support of her demand plaintiff alleges in substance as follows: That on May 26, 1950 she was the owner of real property in Sonoma County. She was then physically and mentally ill and unable to transact busi-

ness. Defendants Edrie Bohne, plaintiff's daughter, and James Meegan, a friend of Edrie, took advantage of her condition and their confidential relationship to her and fraudulently procured her execution and delivery of a deed conveying the property to Edrie. At that time plaintiff did not know she was signing a deed and had no intention of doing so. She received no consideration for the conveyance. Edrie then conveyed the property to Meegan, without consideration, who thereafter, along with defendant Beatrice Meegan, his wife, conveyed the property to defendant Patricia Pierce, receiving \$4,500 in consideration therefor. All three deeds were recorded, the first two being of record when Patricia Pierce bought the property. Upon learning of these matters plaintiff demanded that her daughter and the Meegans pay over to her the money they received from Pierce, which they refused to do. She prays judgment against them in that sum. This count alleges a transitory cause of action and obviously states no cause of action against defendant Patricia Pierce. The second count contains the same allegations as to the first count, save that it omits all reference to plaintiff's demand that the Meegans and her daughter turn over to her the price received from Pierce. By her prayer to that count plaintiff demands that the three deeds be ordered delivered up, that they be canceled and adjudged to be void and that all defendants be compelled to reconvey the real property to plaintiff.

[3] In support of their petition for the writ petitioners contend as follows: 1. Even though the second count be read as involving title to real property yet that count being joined with a transitory cause falls under Section 395 of the Code of Civil Procedure and except for the joinder of Patricia Pierce must be tried in the county of defendants' residence. *Smith v. Smith*, 88 Cal. 572, 26 P. 356; *Ah Fong v. Sternes*, 79 Cal. 30, 21 P. 381; *Warner v. Warner*, 100 Cal. 11, 34 P. 523; *Sheeley v. Jones*, 192 Cal. 256, 219 P. 744. 2. In any event the complaint states no cause of action against defendant Pierce and hence her residence in Sonoma County is immaterial, for the joining as a party defendant of, one

against whom no cause of action is stated does not deprive the other defendants of the right to have the action tried in the county of their residence. *Modlin v. Walter's Fur Shop*, 83 Cal.App.2d 384, 389, 188 P.2d 805. They say no cause of action is stated against Pierce for the reason that it is not charged that she knew of the fraudulent procurement of the deed from plaintiff to her daughter which was of record when she bought, and she is therefore presumed prima facie to be an innocent purchaser in good faith who, having paid value for the property, cannot have her title voided by reason of the allegations concerning the way in which the other defendants obtained the execution of plaintiff's deed. *Fly v. Cline*, 49 Cal.App. 414, 423, 193 P. 615.

[4] Enough has been said to show that substantial questions are to be determined upon the appeal from the order denying a change of venue and therefore it is proper to grant the writ prayed for. *Bardwell v. Turner*, supra, 219 Cal. at pages 230-231, 25 P.2d 978.

Let the writ issue.

SCHOTTKY and PEEK, JJ., concur.



120 Cal.App.2d 598

MOODY et al. v. OSBORNE et al.

Civ. 8214.

District Court of Appeal, Third District,
California.

Oct. 13, 1953.

Hearing Denied Dec. 10, 1953.

Action by purchasers against vendors and against vendors' agent, for specific performance of deposit receipt agreement for sale of real and personal property. The agent cross complained for specific performance and for judgment for his commission. The Superior Court, Placer County, entered judgment for vendors, and purchasers and agent appealed. The District

Court of Appeal, Peek, J., held, inter alia, that where property alleged to be the subject-matter of the agreement sought to be specifically enforced was examined by the parties and was verbally agreed by them to be the same as described in the complaint, thus indicating that no one was misled nor in doubt as to what property was involved, description of property was not so insufficient as to warrant judgment in vendors' favor.

Judgment reversed.

1. Specific Performance ⇨29(1, 2)

Where property allegedly the subject of deposit receipt agreement which purchasers sought to specifically enforce was examined by the parties and was verbally agreed by them to be the same as described in the complaint, indicating that no one was misled nor was any one in doubt as to what property was involved, description of property was not so insufficient as to warrant judgment for vendors.

2. Brokers ⇨94

Where, by terms of deposit receipt agreement for sale of real and personal property, which all of the parties signed, vendors' agent specifically was given right without notice to extend time of payment for an additional period of thirty days, should he deem the extension advisable, agent's action in extending time for purchasers to make their original payment, but not beyond period specified in agreement, was within scope of authority so conferred upon him.

3. Brokers ⇨65(4), 102

Fact that vendors' agent personally loaned money to purchasers in order for them to complete down payment in accordance with deposit receipt agreement for sale of real and personal property, did not establish that agent was duplicitous in his dealings or render the transaction fraudulent as to the vendors.

E. L. Means, Jas. F. Roach, Woodland, for appellants.

F. H. Bowers, Roseville, for appellant Pomeroy.

Lynne Kelly, Grass Valley, Robt. C. Schiffner, Nevada City, for defendants Osborne.

PEEK, Justice.

This is an appeal from a judgment in favor of defendants Osborne, hereinafter referred to as the sellers, in an action instituted by plaintiffs Moody, hereinafter referred to as the purchasers, for specific performance of a deposit receipt agreement for the sale of real and personal property.

In November 1949 the sellers executed a written authorization or listing with the defendant and cross-complainant Pomeroy, hereinafter called the agent, which provided in part as follows: "In consideration of the services of C. M. Pomeroy, broker, hereinafter called the agent, I hereby list with said agent exclusively and irrevocably for a period to March 15, 1950, at twelve noon, the following described property * * *

Although the record contains testimony by the sellers that prior to the execution of the authorization they had advised the agent that they wanted \$20,000 plus assumption of a \$5,700 encumbrance, exclusive of broker's commission, the agent contradicted this testimony asserting that said encumbrance was included within the purchase price. In any event the sellers admitted signing the listing but contended that it was done without reading it since Mr. Osborne was ill at the time. On or about January 13, 1950, a California Real Estate Association Standard Form Deposit Receipt Agreement was executed by all of the parties, which document was revised on or about January 23, 1950. The purchasers at that time gave a check in the sum of \$250 as deposit on account of the purchase price of \$22,250, including the encumbrance then on the property. The agreement further provided that the first installment of \$4,500 was due on or before February 6, 1950. The second installment of \$3,500 was payable on or before June 15, 1950 and specific provisions were made covering the balance. Additionally the agreement provided in Paragraph 6 "that the essence of this agreement is time and the undersigned real estate agent may, without notice, extend the time for an additional

period of thirty days should said agent deem the extension advisable * * *

The sellers testified they objected to an alleged erroneous statement of the purchase price in the deposit receipt as not including the farm loan and only signed the document upon the agent's promise that the same would be corrected to show the assumption and payment of the loan in addition to the \$22,250. They further testified that during the latter part of January and the early part of February 1950 they telephoned to the agent on numerous occasions ordering him to discontinue any further activities and that they did not desire to proceed with the transaction.

Some time prior to February 6, 1950, the due date for the payment of the \$4,250, the purchasers met with the agent, informing him they were having difficulty in meeting that date line. Thereupon in accordance with the provisions of said paragraph 6th the agent extended the time for making said payment to February 17, 1950. On that date the agent and his wife loaned the purchasers \$3,500, taking back a promissory note secured by a deed of trust on certain real property owned by the purchasers in Yolo County. As a part of that same transaction the purchasers gave to the agent their check in the sum of \$750, thereby completing the payment then due. Two days later the agent drove to the sellers' ranch advising them the property had been sold and offered them a check in accordance with the terms of the agreement. However, the sellers refused to accept the payment and the agent then placed the money on deposit with the Placer County Title Company, subject to the sellers' order. From the money so deposited the agent deducted his commission of \$2,250.

On February 22, the purchasers received a telephone call from the sellers declaring the contract void and that their doctor had ordered Mr. Osborne not to sell the ranch. Subsequently on June 9, and prior to the date called for in the agreement, the purchasers again deposited with the Placer County Title Company for the sellers' account, the sum of \$3,500 due on June 15. Upon the sellers' refusal to convey the property the purchasers instituted these proceed-

ings naming both the owners and the agent as parties defendants. The answer of the sellers denied generally the material allegations of the purchasers' complaint and affirmatively alleged the statute of frauds.

The answer of the agent admitted the allegations of the complaint, joined with the purchasers' prayer for specific performance of the agreement, and prayed for judgment for his commission.

The trial court found that the contract and the description of the property were as alleged by plaintiff and that the price was fair and reasonable but in addition it also found that the agent exceeded his authority in extending the time for the first payment without the knowledge or consent of the sellers; that the agent was duplicitous in making the loan to the purchasers which likewise was without the knowledge or consent of the sellers; all of which resulted in an attempted modification of the terms of the agreement.

From the memorandum opinion of the trial court it appears that this conclusion was based upon one of two alternatives, either of which, the court concluded, was fatal to recovery by plaintiff, that is, first, that Pomeroy at all times remained the agent of the sellers and therefore when he loaned money to the purchasers he did so as the purchasers' agent, and hence for that reason only \$1,000 in cash was tendered to them, the balance being represented by a note and trust deed. And since the purchasers did not repay the note to Pomeroy until the following August there resulted an extension of credit for a term of approximately five months, and second, that since at all times Pomeroy was the agent for the sellers, by his acts in personally loaning to the purchasers the amount of the down payment, he thereby placed himself in a duplicitous situation.

Respondents, however, take a different view and in support of the judgment first argue that the description of the property was so insufficient that such defect in and of itself would warrant a judgment in their favor. And secondly, that the agent, in attempting to force his principal, the sellers, to convey to the purchasers upon the terms and conditions, which they contend were

inimical to their welfare, thereby violated the highly fiduciary relationship existing between themselves as principal and himself as their agent.

[1] As to the first point made by respondents the evidence shows without contradiction, and the court found, that the property was examined by the parties and was verbally agreed by them "to be the same as described in the complaint." Thus no one was misled nor was any one in doubt as to what property was involved nor was there any question but that the Osbornes were selling the entire ranch. *Wright v. L. W. Wilson Co., Inc.*, 212 Cal. 569, 299 P. 521.

[2] Furthermore there can be no question but that by the terms of the deposit agreement, which all of the parties signed, the agent specifically was given the right "without notice [to] extend the time for an additional period of thirty days" should he "deem the extension advisable." Hence when he did so extend the time for the purchasers to make their original payment (but not beyond the period specified in the agreement), he was clearly within the scope of the authority so conferred upon him.

[3] Neither can it be said that in personally loaning money to the purchasers in order for them to complete the transaction that he was duplicitous in his dealings. The source of the funds with which such payment was made was of no particular import so far as the sellers were concerned. The fact that it was from funds advanced by the agent did not make the transaction fraudulent as to the sellers. 8 Am.Jur. 1067; *Hicks v. Wilson*, 197 Cal. 269, 240 P. 289. It should be noted that the payment tendered to the sellers was not by note but was by check signed by the agent.

It necessarily follows that since the purchasers and the agent performed all that was required of them by and in accordance with the terms of the contract, the purchasers are entitled to specific performance of the contract and the agent is entitled to his commission.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

Ex parte WATKINS.¹

Cr. 5112.

District Court of Appeal, Second District,
Division 1, California.

Oct. 8, 1953.

Petition for writ of habeas corpus and other relief. The District Court of Appeal held that petitioner did not show grounds for delayed appeal, where notice of appeal had not been filed within time allowed.

Petition denied.

1. Criminal Law §951(1)

Motion for new trial filed more than a year after judgment of conviction of murder was nugatory.

2. Criminal Law §1081

Courts have recognized no excuse for late filing of a notice of appeal whatever the hardship or apparent injustice involved.

3. Habeas Corpus §25(1)

Petition for writ of habeas corpus did not show grounds for delayed appeal from conviction of murder, where notice of appeal was not filed within time allowed, regardless of whether court-appointed counsel had agreed to file such notice at defendant's request made immediately following pronouncement of judgment.

Herman Lee Watkins, in pro. per.

PER CURIAM.

This is a petition for a writ of habeas corpus, which in reality amounts to a petition for a "delayed appeal", in that petitioner asks that "the trial court's records be transcribed and delivered to the petitioner so that petitioner will be enabled to appeal his cause that was denied him in 1946."

It is alleged in the petition that in May, 1946, petitioner was convicted of the crime of first-degree murder and sentenced to imprisonment for life; that immediately following the pronouncement of judgment petitioner requested his "court-appointed counsel * * * to file notice for an appeal"; that his attorney "said that he would

file the motion for appeal as soon as he returned to his office."

No notice of appeal was filed, and petitioner, on June 16, 1946, wrote to the judge who tried his case, requesting preparation of the clerk's and reporter's transcripts on appeal. Under date of June 20, 1946, the trial judge wrote petitioner as follows:

"Referring to your letter of June 16th, it does not seem appropriate for me to make any order at this time for a transcript in your case, for apparently your time to appeal expired without your doing anything about it.

"This matter should be taken up with Mr. Samuelson (petitioner's counsel) or some other attorney."

Petitioner further avers that on June 21, 1946, he was transferred from the Los Angeles County Jail to the State Prison at San Quentin; that "while in the Guidance Center, petitioner was unable to get any kind of law books in order to find out just what steps one could take to get an appeal, or some other relief, and finally on the fourth day of March, 1947, petitioner was transferred to Quentin side and it was then that the petitioner could and did get some law books and began to study."

Petitioner alleges that in an effort to secure relief from his default in the matter of giving timely notice of appeal, he "filed a petition for a review and a request for a new trial on the 13th day of June, 1947; this was presented to the court through the Public Defender's Office and was denied the same day." In this connection petitioner further alleges:

"Petitioner studied some more and filed a petition for a Writ of Error, Coram Nobis, *People v. Watkins*, 92 Cal.App.2d 375, [206 P.2d 1118], which was denied by both the Superior and Appellate Courts in 1948 and 1949; Petitioner continued to study, trying to find some avenue of relief, then on the 30th day of August, 1950, filed a petition for a Writ of Habeas Corpus, in the Superior Court of Marin County, with the District Court of Appeals, First Appellate District, No. 2708—Oct. 23, 1950, and the

Supreme Court of California, No. 5183—December 14, 1950. These were denied. A certiorari *were* denied by the United States Supreme Court, [*Watkins v. Duffy*], 341 U. S. 905, 71 S.Ct. 608, 95 L.Ed. 1344, April 9, 1951, and filed in the United States District Court, No. 30486, Civil—April 20, 1951, this was denied, after Hon. Christian of the Attorney General's Office said that the petitioner had not exhausted his state remedies on Appeal, but this decision was appealed to the United States Court of Appeals, Ninth Circuit, No. 13154—Dec. 13, 1951, [197 F. 2d 816], in which the decision was affirmed, August, 1952, while your petitioner was out in a Forestry Camp and thereafter transferred to the California Institution for Men at Chino, California."

[1] In the instant proceeding no attempt was made to file a motion for a new trial until more than a year after judgment, and such attempt was therefore, as said in *People v. Watkins*, 92 Cal.App.2d 375, 377, 206 P.2d 1118, 1119, "in effect, the same as not making the motion at all."

[2] Determinative of this petition is the language used by the court in *People v. Cox*, 120 Cal.App.2d 246, 247, 260 P.2d 1050, 1051, wherein it was said: "The courts have recognized no excuse for the late filing of a notice of appeal, whatever the hardship or apparent injustice involved." (Citing cases.)

The cause now engaging our attention does not come within the rule of *People v. Slobodion*, 30 Cal.2d 362, 181 P.2d 868. In that case a written notice of appeal was actually delivered to officers of the state prison in ample time to be transmitted to the county clerk, and it was held that this amounted to a constructive filing. No such situation exists here.

[3] Since the facts presented by the petition and the law applicable thereto do not warrant the issuance of an order directing preparation of transcripts on appeal, it becomes unnecessary to appoint counsel to represent petitioner in the preparation of his appeal and the presentation thereof.

The petition is denied.

STOUT v. PATE.

Civ. 19345.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1953.

As Corrected on Denial of Rehearing

Nov. 5, 1953.

Hearing Denied Dec. 17, 1953.

Proceeding on motion to modify custody and support provision of foreign divorce decree. The Superior Court, Los Angeles County, Clarence E. Johns, Judge Pro Tempore, entered judgment granting plaintiff care, custody and control of parties' minor children, and ordering defendant to make \$50.00 monthly payments for support of each child, and defendant appealed. The District Court of Appeal, Moore, P. J., held that foreign injunction enjoining instant proceeding was not bar to such proceeding where court had jurisdiction of minor children, and defendant had answered plaintiff's petition, and had become party to suit.

Affirmed as modified. *

1. Divorce ⇨330

Where husband filed answer to and participated in wife's proceeding to modify terms of foreign divorce decree, trial court had jurisdiction of husband's person.

2. Divorce ⇨332

Where children involved in wife's proceeding to modify terms of divorce decree were residing with wife within boundaries of state, previous judicial award of their custody by foreign courts did not deprive trial court of jurisdiction in instant action.

3. Infants ⇨18

When children, who had resided in other state where judicial inquiry had been made into their status and where orders had been made respecting them, moved to state, they were subject to supervisory jurisdiction and guardianship of state to be exercised for their protection.

4. Judgment ⇨815

Where children reside within state, that state's courts are independent of all judgments of sister states to investigate and determine what are best interests of such children, and order of such state court cannot be challenged upon ground that pri-

or decree of other jurisdiction providing for custody and support of child is res judicata.

5. Infants ⇨19

There is no permanent finality to custodial award of minor children.

6. Infants ⇨19

Custodial award of minor children is subject to modification when status and condition of such minor children require intervention, and are subject to modification or annulment in any state having jurisdiction over such minor children.

7. Constitutional Law ⇨312

Issuance of injunction in foreign court against wife's proceeding for modification of divorce decree involving custody and maintenance of minor children was in violation of wife's rights to due process, where wife and minor children were residents of state in which wife's proceeding was instituted. U.S.C.A.Const. Amends. 5, 14; Rules on Appeal, rule 23.

8. Divorce ⇨298(1)

Judgment ⇨815

Welfare of dependent children is paramount in proceeding for custody of such children pursuant to divorce decree, and courts may investigate and determine what children's best interests are, and what will best promote children's welfare, notwithstanding any judgment or order of court of sister state.

9. Judgment ⇨815

Foreign injunction enjoining wife's local proceeding to amend foreign divorce decree as to custody and support of parties' minor children was not jurisdictional bar to wife's local proceeding where local court had jurisdiction over minor children.

A. Walton Nall, Atlanta, Ga., McBain & Morgan, Los Angeles, by Angus C. McBain, Los Angeles, for appellant.

Sander L. Johnson, Los Angeles, for respondent.

MOORE, Presiding Judge.

The question here for decision is whether a California court may adjudge the cus-

tody and maintenance of minor children despite their previous custodial adjudication by the courts of a sister state.

In March 1948 respondent was awarded a decree of divorce by the Superior Court of DeKalb County, Georgia. Also, it was thereby adjudged that she have custody of the two infants, then of the ages of five and two years. That decree was by the same court modified in December 1949 to the mutual satisfaction of the parties, dividing custodial time between the parents. Subsequent to the divorce decree, respondent remarried and since May 15, 1950, she and her two children have resided in California with the new husband. On July 11, 1951, she instituted this action alleging that conditions and circumstances affecting the children had changed after December, 1949; that it is to the best interests and welfare of the said children that plaintiff be granted sole care, custody and control of them, and asked for judgment accordingly.

Immediately upon learning of the new action, appellant came swiftly from his Georgia home to Los Angeles where he arrived on July 16, 1951. After holding converse with his former spouse concerning the claims made in her complaint, appellant took the children for a ride and rode on back to DeKalb County. Thereupon, respondent visited her erstwhile home where on August 9, 1951, she caused a writ of habeas corpus to be issued by the same superior court for the purpose of obtaining a judicial determination of her right to the legal custody of the children. While the proceeding was pending respondent gained their physical custody and, without the consent of their father, returned them to California. Her efforts to dismiss the proceeding she had last commenced was without avail.¹ However, on her return to California, September 25, 1951, she filed her amended complaint and at once commenced the publication of her summons therein. On October 26 appellant filed his answer pleading specially "as a bar and in abatement" the Georgia divorce decree and its

modification and the pendency of the habeas corpus proceedings in the Superior Court of DeKalb County. Also, he demanded custody of the children.

After a trial, the quizzing of many witnesses concerning the character and background of respondent and her husband, Mr. Stout, and the facts about his income and their home, on May 27, 1952, the court found it to be to the best interest and welfare of the said children that plaintiff be granted care, custody and control of them and that the payment of \$50 monthly for the support of each child is reasonable and judgment was entered accordingly.

[1-6] Appellant now contends that the court below had no jurisdiction to make such judgment and in this behalf he asserts that where jurisdiction is taken over a subject matter and of the persons to a controversy by courts of co-ordinate jurisdiction, priority is determined by the date of service of process; that therefore it was prejudicial error for the court below to conduct a trial during the pendency of the habeas corpus proceeding in Georgia. While the contention of appellant is based upon a sound principle of law, it is not applicable to the circumstances here involved. Appellant is a party hereto, having filed his answer. Thereafter he duly participated in the various stages of the action. The court, accordingly, had jurisdiction of his person. *Judson v. Superior Court*, 21 Cal. 2d 11, 129 P.2d 361; *Zobel v. Zobel*, 151 Cal. 98, 90 P. 191. Also, the court had jurisdiction over his children because they were residing with respondent, a resident of California. *Sampsell v. Superior Court*, 32 Cal.2d 763, 779, 197 P.2d 739. The court could not have been defeated of jurisdiction by any number of previous judicial awards of their custody. They were within California and by the petition of their resident mother they were properly before the court. Because they were children of tender years, it was the court's duty to protect their interest, determine their custodian and conserve their welfare. *Titcomb v. Supe-*

1. The Georgia court not only denied her motion but retained jurisdiction and, just before the trial of the instant cause in

the court below, made its judgment enjoining respondent from proceeding with her California action.

rior Court, 220 Cal. 34, 39, 29 P.2d 206, 209. When children, who have resided in another state where judicial inquiry has been made into their status and where orders have been made respecting them, move into California, "they are subject to the supervisory jurisdiction and guardianship of this state, to be exercised for their protection." The power to make such inquiry is inherent. (*Ibidem.*) When a child is within California the courts are independent of all judgments of sister states to investigate and determine what are the best interests of the child. *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719. And such order of a California court cannot be challenged upon the ground that a prior decree of another jurisdiction providing for the custody and support of the child was *res judicata*. (*Ibidem.*) There is no permanent finality to a custodial award. Out of their very nature they are subject to modification when the status and condition of the minor require intervention and, as shown above, they are subject to modification or annulment in any state having jurisdiction of the subject matter. *Sampsell v. Superior Court*, *supra*. The existence of a prior, valid decree of another state, fixing the custody and providing for the maintenance of minor children, is not a bar to such proceeding in California when the dependents are within the confines of this state. In *re Kosh*, 105 Cal.App.2d 418, 421, 233 P.2d 598. The foregoing is emphasized by the fact that when respondent returned from Georgia with her children and filed her amended complaint, no court of that state had enjoined her from proceeding with this action or had issued any decree or order determining it would be for the best welfare of the children that their father should have their care, custody and control. See *Sampsell v. Superior Court*, *supra*; *Titcomb v. Superior Court*, *supra*.

[7,8] Appellant contends that "when the case at bar proceeded to trial, plaintiff was under order of the Georgia court restraining her from proceeding with the California case." The record does not bear out such contention. While appellant filed his answer herein on November 26, 1951, he did not obtain his restraining order

against respondent's proceeding with this action until May 2, 1952, and did not serve it until three days thereafter. On the 27th of May, the court below, despite a request and its own jurisdiction to do so, declined to order a restraint upon appellant's prosecuting the habeas corpus proceeding in Georgia. The issuance of the injunction in our sister state against respondent's attempting to compel appellant to feed his children in California violated her rights to due process. U.S.Const. Amends. Five and Fourteen; 5 Cal.Jur. 856-858, 861-868. The welfare of dependent children is paramount and courts of California may investigate and determine what are their best interests and what will best promote their welfare, notwithstanding any judgment or order of the courts of a sister state. *Dotsch v. Grimes*, 75 Cal.App.2d 418, 419, 171 P.2d 506. The soundness of the foregoing readily appears from Professor Stansbury's article on "Custody and Maintenance Law Across State Lines" in 10 *Law and Contemporary Problems* 819, 831. The learned author concludes that the court of any state that has a substantial interest in the welfare of a child has jurisdiction to determine its custody; such jurisdiction may exist in two or more states at the same time; a judicial determination of custody in one state is not binding on the courts of a second state. Also, Professor Stansbury's article and that of Professor Stumberg, to wit, "The Status of Children in the Conflict of Laws" (8 *University of Chicago Law Review* 42), concur in the conclusion that judicial control of such matters can best be fulfilled at the actual residence of the child as distinguished from mere domicile.

[9] In view of the foregoing, it is not inappropriate to amend the findings as authorized by Rule 23 of Rules on Appeal by inserting a finding to the effect that the Georgia proceedings pleaded in the defendant's answer are not a bar to the jurisdiction of this court to determine the rights of the parties concerning care, custody and control of the said minor children and what might be to their best interests and welfare.

Of course, nothing declared above is intended to be an abandonment of the prac-

tice that if, in any case it should appear that the circumstances of a prior order in a sister state have not changed, or if it is necessary in order to prevent a multiplicity of actions and avoid vexation and harassment of the defendant, the courts of California, under the doctrine of comity, will in the exercise of discretion stay a proceeding or refuse to change custody.

It is therefore ordered that the findings herein be modified by adding thereto finding VI as follows:

That there is now subsisting in the Superior Court of DeKalb County, State of Georgia, a proceeding in habeas corpus, the purpose of which is to determine the right to the custody of the said minor children.

It is further ordered that paragraph VI be added to the conclusions, to wit:

That neither the previous nor the current proceedings in the State of Georgia are a bar to the jurisdiction of this court to determine the rights of the parties concerning care, custody and control of the said minor children and what may be to their best interests and welfare.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.



120 Cal.App.2d 675

PEOPLE v. ANDARY.

Cr. 5308.

District Court of Appeal, Second District,
Division 1, California.

Oct. 19, 1953.

Hearing Denied Nov. 16, 1953.

Defendant was convicted of crime of grand theft. The Superior Court, Los Angeles County, Clement D. Nye, J., entered judgment and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain conviction of crimes of false pretenses, em-

bezzlement and larceny by trick and device.

Judgment affirmed.

1. Criminal Law ⇨260(11)

Judgment in a criminal action is final as to sufficiency of evidence unless it can be held that sufficient facts could not have been found by trial court to warrant its implied findings and before they can be set aside it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

2. Larceny ⇨1

The crime of theft is complete if a man takes property not his own with intent to take it. Pen.Code, § 484.

3. False Pretenses ⇨49(4)

In prosecution for grand theft, evidence established beyond a reasonable doubt that defendant falsely represented to individual who entrusted defendant with money to invest in business that defendant had existing interest in health association when he had none. Pen.Code, § 484.

4. False Pretenses ⇨49(1)

In prosecution for grand theft, implied findings that assignment by defendant to individual who entrusted defendant with money to invest in business, of interest in defendant's alleged contract with health association and assignment by defendant to same individual of defendant's share in story of defendant's life which were relied on by individual were worthless were supported by evidence. Pen.Code, §§ 1110, 1127b.

5. Embezzlement ⇨44(1)

False Pretenses ⇨49(1)

Larceny ⇨55

In prosecution for grand theft of defendant who gave individual letter reciting that defendant had placed \$15,000 in a health association, an assignment of 50% interest in defendant's contract with health association and assignment of 50% of defendant's share in story of defendant's life and who was intrusted by individual with money to invest, evidence was sufficient to sustain conviction of crimes of false pre-

tenses, embezzlement and larceny by trick and device. Penal Code, §§ 484, 1110, 1127b.

6. Criminal Law ☞1159(2)

Where there was substantial evidence to support verdict of guilty of grand theft, briefs of defendant containing arguments properly addressed to triers of fact were of no concern to appellate court. Pen. Code, § 484.

7. Criminal Law ☞878(3)

Jury's acquittal of defendant on count of indictment charging him with feloniously taking \$1,000 in money did not nullify his conviction on other count charging him with feloniously taking \$4,243.50 in money, the personal property of a named individual. Pen. Code, § 954.

8. Criminal Law ☞1037(1), 1044

Where no objection was made to questions propounded by prosecuting attorney and no motion was made to strike answers given, whether his conduct was prejudicial or offensive would not be determined.

9. Criminal Law ☞824(1, 4)

In a criminal case jury should be given instructions on general principles of law applicable to case, even if not requested by parties, but unless instructions as to specific points developed at trial are requested by parties, it is not incumbent upon Court to give them of its own motion, where jury is otherwise fully and fairly instructed.

10. False Pretenses ☞52

In prosecution for grand theft of defendant who was entrusted with money by individual to invest in business after defendant gave individual assignments of defendant's interest in a health association and in defendant's share in story of defendant's life, refusal to give instruction that assignment was effective to pass title without presence of any signatures of witnesses, seals or notaries was proper under evidence.

11. Criminal Law ☞814(3)

In prosecution for grand theft, refusal to give instruction defining partnership was proper, in absence of evidence that parties had formed a partnership.

12. Criminal Law ☞590(2)

In prosecution for grand theft, record revealed that defendant's counsel was well prepared and represented defendant capably and, therefore, denial of motion for continuance was not prejudicial error.

Levy, Bernard & Jaffe. Saul L. Bernard and Reuben Freedman, Los Angeles, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., Los Angeles, for respondent.

DRAPEAU, Justice.

By information containing two counts, defendant was charged with the crime of grand theft. A jury found him "not guilty" of the offense charged in Count I, to-wit: feloniously taking \$1,000 in money. The jury found him "guilty" of grand theft, as charged in Count II, to-wit: feloniously taking \$4,243.50 in money, the personal property of Lawrence C. Nosco. Thereafter, defendant's application for probation was denied, and judgment and sentence were pronounced.

From the judgment of conviction and from the order denying him a new trial, defendant appeals.

Defendant and the complaining witness, Mr. Lawrence C. Nosco, met in the spring of 1950, while they were playing softball on opposing teams. Mr. Nosco was 32 years of age and was employed by Los Angeles County. Defendant was a professional boxer, known as Tony Janiro. He was 21 years old and had been discharged from the Army for disability.

The two men became friends and had many discussions regarding their personal affairs and interests. Defendant wanted to quit boxing and go into business for himself. Nosco was anxious to invest in a business in order to augment his income.

In June of 1950, defendant told Nosco that he owned a \$40,000 fight training camp; a \$15,000 interest in a health association; an interest in a movie script of the

story of his life worth \$30,000; and two automobiles.

He showed Nosco a document indicating that he had an investment in the health association of \$15,000, and Nosco saw two automobiles parked in front of defendant's house.

Defendant knew Mr. Rex Bixby, who was connected with the Gem Water Softener Company. He reported to Nosco that he had talked to Mr. Bixby, and that the latter told him it would be necessary to purchase 500 softeners at \$10 each, in order to get the west coast franchise for distribution thereof. Defendant also told Nosco that it would be easy to sell the softeners for about \$27.50 each; that the investment would require about \$5,000, and defendant promised to guarantee Nosco for every penny that he put in. He said he wanted Nosco to be secured so that he would not sustain a loss if the business did not pay.

To start the project, defendant told Nosco he would need \$1,000 for 100 softeners, and that if they decided not to go ahead, the company would refund the \$1,000 within 90 days.

The two men agreed on an equal division of the profits and defendant promised to have a formal contract prepared.

After many discussions, Nosco gave defendant his check for \$1,000 payable to defendant's order, dated July 31, 1950. Defendant gave Nosco "a promissory note as a receipt for the money", pending execution of the promised contract. Defendant testified he turned over the \$1,000 to Mr. Bixby and received 100 softeners from him. This was denied by Bixby.

On August 19, 1950, Nosco gave defendant another check for \$4,243.50, to cover the balance agreed upon. As security therefor, defendant gave to Nosco the following three instruments which Nosco accepted "as security until he (defendant) got the contract made."

(1) A letter dated December 15, 1948, written on the letterhead of American Independent Medical & Health Association, signed by J. C. Fortune, as President, and A. G. Howard, as Secretary. This docu-

ment recited that defendant had placed \$15,000 with said company, which entitled him to a monthly interest payment of \$187.50.

(2) Attached to said letter was an assignment by defendant to Nosco of a 50% interest in defendant's contract with the health association. At the bottom of the assignment appeared the purported signature of "Charles W. Ostrom Att. in fact."

(3) Assignment by defendant of 50% of his share in the story of his life "Fear of Death." This assignment was dated August 18, 1950, was signed by Tony Janiro, and showed a purported notarization by "Modess Moscowitz."

Mr. Fortune testified that he never wrote the letter of December 15, 1948; did not sign his name thereto, and that defendant had never placed \$15,000 on deposit with the association. A. G. Howard testified likewise, that the signature on the letter was not her signature, and that the company had never received the \$15,000 from defendant.

Mr. Ostrom testified that he did not sign his name at the bottom of the assignment and that the signature appearing thereon was not his.

Also, the records of the Los Angeles County Clerk's office failed to disclose the name "Modess Moscowitz" listed as a notary public.

Nosco testified that in paying the \$4,243.50, he relied upon the genuineness of the signatures and the truth of the documents, above mentioned, and also upon defendant's "financial background as to everything he told me at the April first meeting." He believed defendant's promise that he would take the money and pay it to the Gem Water Softener Company for the softeners, otherwise he would not have given the money to defendant.

Defendant testified that shortly after he got the \$4,243.50 from Mr. Nosco, he told Mr. Bixby that the money was available. However, Bixby informed him that, due to the delay in raising it and because of the illness of Mr. Wilson, president of the company, it might take several months before he (Bixby) could go ahead. Defendant refused to leave the money with

Bixby in the meanwhile, as requested by Bixby, stating that there was a chance he might invest it in steel. The Gem Water Softener Company was later dissolved and ceased doing business after the death of Mr. Wilson in October, 1951.

Mr. Nosco testified that after he gave defendant the \$4,243.50 check, he had a talk with Mr. Fortune, president of the health association. Thereafter, he called on defendant and told him he was no longer interested in the water softener business, because he had learned that it was no longer prospering; that he wanted his money back. Defendant kept putting him off. He took a trip to Europe and used part of Nosco's money to buy an MG automobile and to pay for transportation, hotel bills and other expenses. When he came home, Nosco again demanded a return of his money. Defendant claimed he had made an investment in a European import-export business and intended to form a corporation. Again Nosco told him he was not interested in any business.

In the spring of 1951, Nosco made a last effort to get his money back. Defendant told him he was working on it; that his fight training camp had been "absorbed in a previous trial"; the automobile was gone; his \$15,000 investment had been lost; but he would try to see if he could get some money on the "story of his life". Ultimately, defendant said to Nosco: "Well, take me to court. Sue me. Take me to court."

Defendant testified at the trial that he had never put \$15,000 into the health association; admitted he told Nosco he had an interest in the association and when asked: "You didn't tell him (Nosco) that you had not paid the \$15,000 in, did you?" he replied: "No, I didn't. Why should I tell him?"

Appellant urges that the evidence is insufficient to establish the crime of grand theft because:

(a) It failed to show any false representations as to past or existing facts; (b) the documents relied upon were insufficient to corroborate the charge of false pretenses; (c) the evidence of false pretenses

failed to establish that crime. (d) The evidence failed to show (1) intention to defraud; (2) commission of actual fraud; or (3) guilt of either embezzlement or larceny by trick.

The following language in *People v. Waxman*, 114 Cal.App.2d 399, 405, 250 P.2d 339, 343, is fairly applicable to the problem posed by the instant appeal, to-wit:

[1] "The judgment in a criminal action is final as to the sufficiency of the evidence unless '*it can be held that sufficient facts could not have been found*'" by the trial court to warrant its implied findings, and before they 'can be set aside * * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.' *People v. Jones*, 36 Cal.2d 373, 375, 224 P.2d 353, 354; *People v. Newland*, 15 Cal. 2d 678, 681, 104 P.2d 778. That there is a sound hypothesis in the law and also abundant material evidence contained in the record of this action to support the judgment cannot be doubted.

"In order to simplify criminal procedure, the legislature in 1927 consolidated the statutes on larceny, false pretenses and embezzlement in one, under the heading of 'theft.' Penal Code, sec. 484; see, also, secs. 485 to 490a. *While appellant recognizes that grand theft may be committed by proving that the accused obtained the money of his victims by any one of the three crimes, he has at great pains attempted to show that the evidence is not sufficient to justify a finding of guilt under any of the three hypotheses embraced within section 484.*" (Emphasis added.)

[2] And, as stated by this court in *People v. Hiden*, 102 Cal.App.2d 655, 659, 228 P.2d 95, 97:

"Defendant's contentions of insufficiency of the evidence to support the counts of the information are answered if a theory of theft which will meet the test of reasonable doubt may be drawn from the evidence.

"Penal Code, § 484, now amalgamates the crimes of larceny, embezzlement, false pretenses, and kindred crimes under the cognomen of theft. *People v. Myers*, 206

Cal. 480, 275 P. 219; *People v. Cannon*, 77 Cal.App.2d 678, 176 P.2d 409. Like charity, California's definition covers a multitude of sins. No longer need the legal profession puzzle over fine distinctions between embezzlement, larceny, and other elements of stealing. The crime is complete if a man takes property not his own, with intent to take it.

"This section of the Penal Code makes it a crime for any person 'by any false or fraudulent representation or pretense' to 'defraud any other person', and to 'fraudulently appropriate property which has been entrusted to him'."

[3] The evidence in this case, above recited, established beyond a reasonable doubt that appellant falsely represented to Mr. Nosco that he had a present, existing interest in the health association when in truth and in fact he had no interest at all.

The script of the story "Fear of Death" was introduced in evidence, together with expert testimony that it had a potential value of \$30,000. All of this was considered by the jury. And under section 1127b of the Penal Code, "The jury is not bound to accept the opinion of any expert as conclusive, but should give to it the weight to which they shall find it to be entitled. The jury may, however, disregard any such opinion, if it shall be found by them to be unreasonable."

[4] The implied findings of the jury that the two assignments, executed by appellant and relied upon by Mr. Nosco, were worthless, must be sustained.

Section 1110, Penal Code, requires that "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense * * * or having obtained from any person any * * * money * * * the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony * * * of one witness and corroborating circumstances".

Compliance with this section is found in the testimony of Mr. Nosco that he relied upon appellant's statement that he had placed \$15,000 with the health association. The false purported letter of the association is in evidence. It was not issued by the association. Neither the president nor the secretary signed it. Nonetheless, appellant personally executed an assignment to Nosco of said false purported interest, knowing that he did not possess it.

[5] Without enumerating the elements that go to make up the crimes of false pretenses, embezzlement and larceny by trick or device, suffice to say that the evidence here produced was amply sufficient to sustain a conviction upon any or all of these offenses:

False pretenses: False representations made by appellant with intent to defraud; belief and reliance of Nosco upon such representations, who, while so believing, parted with his money.

Embezzlement: The money having been obtained for a specific purpose, was not used for that purpose and was not returned to Nosco, raising the inference that appellant originally intended to pay it to the Gem Water Softener Company, but changed his mind.

Larceny by trick and device: The evidence supports the inference that appellant, although he represented he would pay the money to the water softener company, intended, when he received it, to appropriate it to his own use; and that Nosco did not intend to pass title to appellant so that he could use it as he saw fit. *People v. Jones*, 36 Cal.2d 373, 224 P.2d 353; *People v. Waxman*, 114 Cal.App.2d 399, 250 P.2d 339.

As was so aptly stated by the Supreme Court in *People v. Nor Woods*, 37 Cal.2d 584, 586, 233 P.2d 897, 898: "* * * defendant could be found guilty of theft by one means or another, and since by the verdict the jury determined that he did fraudulently appropriate the property, it is immaterial whether or not they agreed as to the technical pigeonhole into which the theft fell. *People v. Jones*, 61 Cal.App.2d 608, 622-623, 143 P.2d 726; *People v. Caldwell*, 55 Cal.App.2d 238, 256, 130 P.2d 495."

[6] The briefs of appellant contain many arguments properly addressed to triers of fact. They are of no concern to an appellate court where as here, there is substantial evidence to support the verdict. *People v. Jones*, supra, 61 Cal.App.2d 608, 627, 143 P.2d 726.

[7] Appellant urges that the verdict guilty as to count II and not guilty as to count I are inconsistent. Section 954 of the Penal Code provides: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." See, also, *People v. Shaw*, 115 Cal.App.2d 597, 602, 252 P.2d 670.

[8] Appellant asserts the prosecuting attorney was guilty of prejudicial misconduct. The testimony of Mr. Fortune and Mrs. Fortune, formerly Miss Howard, revealed that their purported signatures on the letter of December 15, 1948, were similar to rubber stamps which were kept in the office. During questioning of Miss Howard, she was asked:

"Were they (the rubber stamps) kept in such a place that this defendant could have access to them for the purpose of making an impression of them and then making a tracing over that? A. I imagine anybody coming into the office could do that.

"Q. Does that include the defendant? Were they accessible to him? A. Yes, sir.

"Q. Was he around there sometimes? A. Yes, he was in the office several times."

No objection was made to the questions propounded and no motion was made to strike the answers given. And, as stated in *People v. Norris*, 99 Cal.App.2d 658, 663, 222 P.2d 283, 286: "In the absence of a showing that the prosecuting attorney asked questions solely for the wanton purpose of creating a prejudice against the defendant or that his acts militated against a fair and orderly procedure, it cannot be said that his conduct was prejudicial or offensive."

[9] Appellant argues that a cautionary instruction, based on appellant's testimony that the transaction was a loan, was essential, and failure to give it to the jury was prejudicial.

This instruction was not requested. And, as said in *People v. Klor*, 32 Cal.2d 658, 662, 197 P.2d 705, 707:

"It is true that in a criminal case a jury should be given instructions on the general principles of law applicable to the case and even if not requested by the parties such instruction should be given by the court of its own motion. But this is not the rule as to specific points developed at the trial. Unless instructions thereon are requested by the parties desiring them it is not incumbent on the court to give them of its own motion where the jury is otherwise fully and fairly instructed on the general principles of law involved in the case."

[10] Error is also urged in the refusal of the court to give an instruction to the effect that "an assignment is effective to pass title without the presence of any signatures of witnesses, seals or notaries."

The testimony of Mr. Nosco was that when he took the two assignments and gave his money to appellant, he relied on the signatures appended thereto: C. W. Ostrom, an attorney, and Modess Moscovitz, a notary public; and that he would not have parted with his money if he had not believed the signatures were genuine.

The assignments were in evidence. And it was for the jury to determine the true nature of the transactions. The requested instruction was properly refused.

[11] Appellant urges error in the refusal of the court to give his tendered instruction defining partnership. Such refusal was proper. There is no evidence in the record that the parties had formed a partnership.

[12] Finally, appellant urges that the court abused its discretion in refusing a continuance.

The record shows that on October 29, 1952, Mr. Zeman's request to be substituted for Mr. Rosen was denied without prejudice, the trial court indicating that the matter was expected to go to trial on November 5th. It also shows that Mr. Zeman came into the cause two days before the trial started, and that after two days of trial, Mr. Zeman, at his request, was

granted three days in which to outline his procedure. The trial consumed seven days: November 5, 6, 7, 10 and 12, the 13th was taken up with arguments of counsel; on the 14th the jury was instructed, deliberated and returned its verdict. It thus appears that Mr. Zeman had at least five days for preparation and was furnished with a reporter's daily transcript of the testimony. An examination of the entire record reveals that appellant's counsel was well prepared and informed on all phases of the case and represented him capably and conscientiously. No substantial right of appellant was prejudicially affected by the denial of his motion for a continuance.

For the reasons stated, the judgment and the order appealed from are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.



120 Cal.App.2d 619

SCOTT et al. v. NEVIS et al.

Civ. 8249.

District Court of Appeal.
Third District. California.

Oct. 15, 1953.

Action for damages to plaintiffs' truck and trailer as the result of a collision with defendants' tractor truck and semi-trailer on a highway bridge. From a judgment of the Superior Court, Solano County, Joseph M. Raines, J., for defendants, plaintiffs appealed. The District Court of Appeal, Schottky, J., held that evidence that the driver of plaintiffs' truck entered the bridge, which was narrow, wet and slippery, at a speed of about 30 miles per hour, when he could not see further than the length of the bridge because of fog, was sufficient to support the trial court's finding that such driver so negligently drove and maintained the

truck and trailer as to contribute proximately to and cause the collision and any damages sustained by plaintiffs, so as to preclude recovery by them.

Judgment affirmed.

1. Appeal and Error ⇨1010(1)

To justify appellate tribunal in reversing judgment on ground of insufficiency of evidence to support trial court's fact findings, record must show that, accepting full force of evidence adduced, with every inference which may be drawn therefrom favorable to prevailing party, and excluding all evidence in conflict therewith, law still precludes such party from recovering judgment.

2. Appeal and Error ⇨931(1)

On appeal from judgment on trial court's fact findings, evidence must be construed most strongly against losing party.

3. Appeal and Error ⇨931(1)

On appeal from judgment on trial court's fact findings, every favorable inference and presumption fairly deducible from evidence should be resolved in favor of prevailing party.

4. Appeal and Error ⇨931(1)

On appeal from judgment on trial court's fact findings, prevailing party's evidence must ordinarily be accepted as true and contradictory evidence must be disregarded.

5. Negligence ⇨82

The doctrine of contributory negligence, barring plaintiff's recovery of damages, is based on such an act or omission of plaintiff, amounting to want of ordinary care, as, concurring or co-operating with defendant's negligent act, proximately caused injury complained of.

6. Appeal and Error ⇨989

On appeal from judgment on trial court's fact findings, appellate court's power begins and ends with determination as to whether there is substantial evidence supporting judgment.

7. Automobiles ⇨245(78)

In action for damages to plaintiffs' truck as result of collision with defendants'

tractor truck on narrow, wet and slippery highway bridge, whether driving of plaintiffs' truck on to bridge at speed of about 30 miles per hour, though prima facie speed limit was 15 miles per hour and driver could see no further than length of bridge because of fog, constituted negligence barring recovery by plaintiffs, was fact question for court trying case without jury. Vehicle Code, §§ 510, 511(a)(3), 513.

8. Automobiles ⇨244(58)

In action for damages to plaintiffs' truck, colliding with defendants' tractor truck on narrow, wet and slippery highway bridge, evidence that driver of plaintiffs' truck entered bridge at speed of about 30 miles per hour, though prima facie speed limit was only 15 miles per hour and he could see no further than length of bridge because of fog, was sufficient to support trial court's finding that such driver so negligently drove and maintained truck as to proximately contribute to and cause collision and any damages sustained by plaintiffs, so as to bar recovery by them. Vehicle Code, §§ 510, 511(a)(3), 513.

Horace E. Dunning, Sacramento, W. H. Herbert & Leo C. Dunnell, Fairfield, for appellants.

Berry & Davis, Oakland, for respondents.

SCHOTTKY, Justice.

Plaintiffs filed an action for damages against defendants, alleging that a Kenworth tractor truck and semi-trailer owned by defendants collided with and damaged a GMC truck and trailer owned by plaintiffs. Defendant Nevis filed a cross-complaint seeking damages against plaintiffs for the alleged negligent operation of plaintiffs' truck and trailer. The cause was tried before the court without a jury and the court found that the accident was caused by the concurring negligence of the drivers of the respective vehicles. Judgment was entered that plaintiffs take nothing by their complaint and that defendant Nevis take nothing by his cross-complaint. Plaintiffs appealed from the judgment in favor of defendants and against plaintiffs.

[1-4] The sole contention of plaintiffs upon this appeal is that the evidence does not support the findings but establishes as a matter of law that plaintiffs are entitled to judgment. It is a rule too well established to require the citation of authorities that before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

Bearing in mind this familiar rule, which, we are constrained to state, is too often disregarded by counsel who pay lip service to the rule and then proceed to argue the weight of conflicting evidence before an appellate tribunal, we shall give a brief summary of the evidence as disclosed by the record.

On the morning of November 15, 1949, one Sidwell, employee of plaintiffs, was traveling south on the Rio Vista-Dixon Highway in a 1947 model GMC cab-over truck and trailer owned by plaintiffs. The combined unit, truck and trailer, was 60 feet in length, and the width of the unit was 8 feet. At the same time one Noia, employee of defendant, was traveling north upon said highway in a 1944 model Kenworth tractor-truck pulling a semi-trailer, owned by the defendant. The combined unit, truck and semi-trailer, was 60 feet in length, and the width of the unit was 8 feet. Each driver was the sole occupant of the vehicle he was driving. The weather conditions at this time were referred to as poor because of the presence of dense tule fog. Visibility was estimated by the drivers to be between 50 and 100 feet. The condition

of the road was wet and slippery due to the precipitation of fog upon it. The road itself was a 16 foot macadam topped highway, with dirt or clay shoulders. On this highway was located a bridge over a tule pond, said bridge being 100 feet in length and 18 feet in width. The floor of the bridge was of wood construction with macadam topping. The bridge was lined on either side by a concrete curbing of about 4 to 6 inches in height. Mounted upon this curbing on either side were sixteen concrete guard posts, joined by a double line of concrete connecting poles. At each end of the bridge on either side it flared out onto the shoulder. Both of the vehicles referred to were approaching the bridge at about 7:15 a. m. on the morning referred to. Both of the drivers had the lights burning on their respective vehicles. Apparently neither of the drivers saw the other approaching the bridge, and both of the vehicles entered upon the bridge at about the same time. At some point near or about the center of the bridge, lengthwise, the two vehicles collided, the left front portion of plaintiffs' tractor-truck and the left front portion of defendant's semi-trailer first making contact. After the impact the trailers from both units were severed from the tractors and came to rest at opposite ends of the bridge. The tractors of both units proceeded on off the bridge in the direction in which they were originally traveling and came to rest on the west shoulder of the road. Almost immediately after the collision another vehicle owned by plaintiffs and operated by another one of its drivers came upon the scene of the accident and collided with the semi-trailer of defendant's unit, which was situated across the north end of the bridge. No one was seriously injured.

Both drivers testified that they had traveled the road before and knew of the presence of the narrow bridge upon which the collision occurred. Each testified, however, that he did not see the other until he had entered upon the bridge. According to the testimony of both drivers neither of them applied or attempted to apply their brakes after he saw the other. Each testified that the speed of his respective vehicle was about 30 miles per hour before entering upon the

bridge, and that after entering upon the bridge he slowed the speed of the vehicle. Each testified that he was on his side of the white center dividing line, and that after entering upon the bridge the wheels on the right side of his vehicle were rubbing the curbing on the outer side of the bridge. The driver of plaintiffs' vehicle testified, however, that the defendant's vehicle was not on its side of the road when entering upon the bridge, and that this condition existed right up to the point of impact.

Appellants contend that there is no substantial evidence to support the finding that the driver of their truck was negligent and that his negligence contributed proximately to the collision. They base their contention upon two propositions:

(1) That the evidence clearly establishes that the respondent's vehicle was on the wrong side of the road; (2) that the excessive speed of appellants' vehicle in no way contributed to the collision, though such might admittedly be deemed negligence.

[5] As was stated in *Dicken v. Souther*, 59 Cal.App.2d 203, at page 208, 138 P.2d 408, at page 411:

"* * * The doctrine of contributory negligence which will prohibit a plaintiff from recovering damages for injuries received is based on 'such an act or omission on the part of the plaintiff amounting to a want of ordinary care as, *concurring or co-operating* with the negligent act of a defendant, was the proximate cause of the injury complained of.'"

[6] In view of the evidence in the instant case and the rule that power of an appellate court begins and ends with a determination as to whether there is substantial evidence to support the judgment, it is difficult to understand how appellants can seriously urge the contention that the finding of contributory negligence is unsupported.

[7] For the testimony of appellants' own driver was that he would not under any weather conditions enter upon the bridge in question when there was another vehicle upon it. Appellants' driver also testified that his visibility was poor, not being over

80 to 100 feet. The driver knew of the presence of the bridge and its narrowness; he knew that the surface of the road was slippery due to the precipitation of fog upon it. Yet, with the statement that he would never enter upon the bridge under any circumstances with another vehicle upon it, appellants' driver did enter upon the wet and slippery bridge when he could not see, at most, any further than the length of the bridge, if that far. (The bridge was 100 feet long.) And even in the face of his knowledge of the narrowness of the bridge, its slippery conditions, and his limited visibility, appellants' driver entered upon the bridge at a speed of about 30 miles per hour. Under Vehicle Code section 511(a)(3) the prima facie speed limit for the driver was 15 miles per hour. Section 510 of the Vehicle Code provides:

"No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Section 513 of the Vehicle Code provides that proof of speed in excess of the prima facie limit declared in section 511 shall not be deemed to establish negligence as a matter of law but it shall be necessary to establish as a fact that the operation of the vehicle at such excess speed constituted negligence. In the instant case it was a question of fact for the trial court to determine whether or not the speed of appellants' truck constituted negligence.

[8] We are satisfied the evidence of the speed of appellants' truck, together with all of the factors hereinbefore set forth, as shown by the record, provide ample evidence to support the finding of the court that the driver of appellants' truck "so negligently and carelessly drove, operated and maintained said trucks and trailers as to proximately contribute to and bring about said collisions and the damages, if any, by plaintiff sustained."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

HARROLD v. HARROLD. *

Civ. 8270.

District Court of Appeal,
Third District, California,

Oct. 9, 1953.

Hearing Granted Dec. 3, 1953.

Divorce action by wife on ground of extreme cruelty. The Superior Court, Sacramento County, Malcolm C. Glenn, J., entered final divorce decree in favor of wife, and both parties appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to sustain trial court's finding that gross community income for the accounting period amounted to \$88,224.

Judgment affirmed.

See also 256 P.2d 626.

1. Husband and Wife ⇨264

In divorce action by wife on ground of extreme cruelty, evidence was sufficient to sustain trial court's finding that gross community income for the accounting period amounted to \$88,224. Civ.Code, § 146, subd. 1.

2. Husband and Wife ⇨257

Where husband is operating a business which is his separate property, income from such business is allocated to community or separate property in accordance with extent to which it is allocable to husband's efforts or his capital investment.

3. Appeal and Error ⇨989, 1010(1)

Issues of fact are for trial court to determine, and, where judgment is attacked as being unsupported by evidence, an appellate court's power begins and ends with determination as to whether there is substantial evidence, contradicted or not, which will support trial court's conclusion.

4. Divorce ⇨252

Wife, who was awarded divorce on ground of extreme cruelty, was entitled to more than one-half of the community property, which amounted to \$88,224, and award to her of 51.13% thereof did not constitute an abuse of trial judge's discretion. Civ. Code, § 146, subd. 1.

* Subsequent opinion 271 P.2d 489.

5. Husband and Wife ⇨265

Husband is manager of the community property, and, even though both husband and wife have present, existing and equal interest in such community property, husband's management and control of such community property exists during continuance of marriage. Civ.Code, §§ 161a, 172.

6. Husband and Wife ⇨272(1)**Interest** ⇨39(3)

Power of husband over community property existed until entry of final divorce decree, and, therefore, wife, who obtained divorce on ground of extreme cruelty, was not entitled to interest on her share of the community property prior to time of entry of final decree. Civ.Code, §§ 161a, 164, 172, 687, 1915.

7. Divorce ⇨186

Where, in divorce action by wife on ground of extreme cruelty, wife was granted divorce in interlocutory decree entered on February 16, 1949, but, on November 25, 1950, her appeal resulted in affirmation of such decree in all respects except that husband's earnings up to time of final decree were to be considered as community property and wife was to be awarded more than one-half thereof, entry of final decree of divorce upon completion of subsequent trial on such limited issues was proper.

8. Divorce ⇨252

Where wife was awarded divorce on ground of extreme cruelty, trial court had wide discretion in division of the community property and in determining what expenses and costs should be allowed as deductions therefrom. Civ.Code, § 146, subd. 1.

9. Divorce ⇨252

Where wife had been awarded divorce on ground of extreme cruelty, and total community accruing accounting period was \$88,224, refusal to allow defendant, as deductions from community property, \$45,323.41 expenses made up of alimony payments, allowed as a penalty, court costs, counsel fees awarded wife, cost of husband's own support, husband's counsel fees, litigation expense, and other disbursements, except for gifts, did not constitute an abuse

of trial court's discretion. Civ.Code, § 146, subd. 1.

David Livingston, Louis F. DiResta, San Francisco, Wilke & Fleury, Sacramento, for appellant and cross-respondent.

Devlin, Diepenbrock & Wulff, Sacramento, for respondent.

SCHOTTKY, Justice.

Plaintiff and defendant were married November 26, 1936, and first separated in the fall of 1944, at which time the plaintiff-wife instituted an action for separate maintenance and a division of the community property. The action did not proceed to trial and in June of the following year the parties entered into a separation agreement which purported to settle all property rights arising out of the marriage. The agreement also provided that each relinquished all claims against future earnings of the other and all interests or rights in or to any property thereafter acquired by either. In September, 1945, the parties became reconciled but again separated in March, 1948. Plaintiff then filed an action for divorce which is the basis of the present proceeding. After a hearing was had in September, 1948, an interlocutory decree was entered in February, 1949. In the findings the trial court stated that the separation agreement was fair; that the parties by their reconciliation ratified all parts of the agreement except as to the unexecuted provisions, which they had abandoned; that the community property of the parties consisted of a specified sum; that the earnings of defendant commencing September 15, 1945, were earnings of the community and were derived from two automobile enterprises which were defendant's separate property. The court further awarded plaintiff \$400 a month for five years as permanent maintenance.

Plaintiff appealed to this court from the judgment, citing various errors, three of which involved: (1) the computation by the court of the amount of income allocated to defendant's separate property interests; (2) the failure of the court to consider the earnings of the defendant up to the time of the final decree as community property;

(3) the failure of the court to award the non-offending plaintiff more than one-half of the community property since the ground for divorce was extreme cruelty. This court affirmed the interlocutory decree in all respects except that it ordered that the earnings of defendant up to the time of the final decree be considered as community property; and that the plaintiff be awarded more than one-half of the community pursuant to Civil Code section 146, subd. 1. Harrold v. Harrold, 100 Cal.App.2d 601, 224 P.2d 66.

Upon the second trial, which began on November 1, 1951, it appears that at the outset it was agreed that the court was to determine the amount of community property accruing subsequent to July 31, 1948 and up to the time of the final decree, and then also to determine the proportion that should be awarded to plaintiff. The parties stipulated in writing prior to the second trial that the accounting should run from July 31, 1948, up to three months prior to the date of the final decree. The trial court in its findings concluded that the final decree would be entered on November 1, 1951, and based its findings on this conclusion. The findings and the final decree of divorce were entered on said date and the period of accounting was from August 1, 1948 to August 1, 1951.

Testimony covering more than 600 pages of the Reporter's Transcript was taken and numerous and voluminous exhibits were introduced, and following the trial the court found substantially as follows:

That the total gross earnings of defendant were comprised of:

"From August 1, 1948 to May 15, 1951, salary, including bonus of \$11,374	\$73,974.00
"From May 15, 1951 to June 1, 1951, salary	1,100.00
"Director's fees, to August 1, 1951, \$10.00 per meeting	1,430.00
"Received from the Northern Motor Co., a corporation, salary	9,000.00

"Total amount of salary received by defendant from said two companies to June 1, 1951 85,504.00

"That defendant received from the Ellsworth Harrold Co., during the period from June 1, 1951 to the 1st day of August, 1951, two months, at the rate of \$2,200.00 per month 4,400.00

"That the total amount received by defendant as community earnings is \$89,904.00"

That the defendant should be allowed a credit of \$1,680.00 for amounts received by plaintiff from him, leaving a balance for division between the parties of \$88,224 accruing from July 31, 1948 to August 1, 1951; that defendant received no compensation from Ellsworth Harrold Co. during the period from January 1, 1951 to March 31, 1951, because he was on vacation;

That while defendant and one Peters were copartners, said defendant neither received nor earned any community funds;

That during the period of accounting plaintiff received \$400 per month from defendant, but that defendant was not entitled to a credit or offset therefor because same was in the nature of a penalty;

That during the accounting while defendant had numerous expenses for living expenses, pleasure trips, etc., defendant was not entitled to any credit or offset therefor since no such allowance was made to plaintiff, her \$400 a month award being allowed her as a penalty, and if each party were allowed any sum the amount would have to be equal as to each of them, therefore the division is equal whether there is an equal monthly split as to each or the total is divided in half, and a preferential allowance then made to plaintiff;

That since the gross community income for the accounting period was \$88,224, plaintiff was entitled to \$45,112, and defendant was entitled to \$43,112;

That each party must pay his or her separate income tax so far as this community income is concerned.

From the foregoing findings the court concluded that plaintiff was entitled to judgment against defendant in the sum of \$45,112 and that payment thereof shall be in full acquittance of her community property rights. These conclusions were incorporated in the judgment which also granted plaintiff a final decree of divorce.

Both plaintiff and defendant have appealed from the judgment, the plaintiff designating her appeal as being from certain specified parts of the judgment, and defendant designating his appeal as being from that part of the judgment "which specified that plaintiff shall have and receive from defendant the sum of \$45,112.00."

We shall first discuss

Plaintiff's Appeal

Plaintiff has outlined her specific contentions as follows:

1. That the trial court failed to make any finding as to the reasonable value of services performed by respondent;

2. That assuming there was such a finding it is not supported by the evidence;

3. That there is no evidence to justify the refusal of the trial court to allow compensation to the community for the period during which respondent was on vacation, namely, January 1, 1951 to March 31, 1951;

4. That the community was entitled to a credit for the bonus awarded respondent by the Ellsworth Harrold Co. on January 8, 1951, and paid to him in 1952;

5. That the community is entitled to a credit on account of respondent's participation in the partnership of Harrold and Peters and its successor, Central City Co.;

6. That the award to appellant of only 51.13% of the community property disregards the applicable law and the mandate of the prior appeal;

7. That appellant is entitled to interest on her share of the community property;

8. That the Superior Court erred in entering a final decree;

9. That on the prior appeal the interlocutory decree was reversed as to the amount of the community property and the division thereof;

10. That under the mandate on the prior appeal the Superior Court should have entered a new interlocutory decree.

The first five of these contentions are an attack upon the court's determination as to the amount of community property available for division during the specified accounting period. As hereinbefore stated the Reporter's Transcript comprises more than 600 pages, and numerous exhibits consisting of defendant's books, records and income tax returns were introduced in evidence. It is apparent that the court's findings were based to a large extent upon the books and records and the salaries shown to have been received by defendant from his various enterprises (all of which were separate property of defendant). At the trial plaintiff sought to impeach these records by seeking to show that they in fact reflected only a nominal salary. Plaintiff upon this appeal argues that the amount of community property acquired during the accounting period was far greater than the amount found by the court, and seeks to show that defendant's contribution to the income of these enterprises during such period was far greater than the amount found by the court.

[1] Notwithstanding the apparent earnestness of counsel for plaintiff, we are convinced that their argument is in effect an argument as to the weight of conflicting evidence, and while persuasive it is unconvincing, because we are satisfied that the conclusion reached by the learned judge is fully supported by the record.

[2] The rule followed by the court, and which it is conceded is applicable to the instant case, is stated in *Huber v. Huber*, 27 Cal.2d 784, at page 792, 167 P.2d 708, 713, as follows:

"* * * In regard to earnings, the rule is that where the husband is operating a business which is his separate property, income from such business is allocated to community or separate

property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment. Estate of Gold, 170 Cal. 621, 151 P. 12; Witaschek v. Witaschek, 56 Cal.App.2d 277, 132 P.2d 600; 3 Cal.Jur. 10-Yr. Supp., Community Property, § 46."

Plaintiff refers to this language from the Huber case and states: "This demonstrates that the trial court cannot accept as conclusive the arbitrary determination by Harrold as to the amount of his salary. The court must consider the evidence. Otherwise, the decision is just as arbitrary as the conduct of Harrold."

The difficulty with plaintiff's contention is that there was voluminous testimony as to the business enterprises, their operation and defendant's participation therein, and while, as is usual in such cases, the trial court had a difficult question to decide, the following language in our opinion upon the former appeal, 100 Cal.App.2d 601, 224 P.2d 66, 70, is equally applicable here:

"* * * We are convinced from our examination of the record that the trial court conscientiously endeavored to follow the rule as enunciated in the Huber case and to make an equitable allocation of personal income and community earnings as was warranted under the particular facts and circumstances disclosed in the present case."

[3] Issues of fact are for the trial court to determine and where a judgment is attacked as being unsupported by the evidence an appellate court's power begins and ends with a determination as to whether there is substantial evidence, contradicted or uncontradicted, which will support the trial court's conclusion.

Plaintiff contends also that the award of \$45,112, amounting to 51.13% of the community property, disregards the applicable law and the mandate of the former appeal. She cites a number of decisions in support of her contention and urges that this court re-divide the community property available for division, giving her 75% and defendant 25%.

Section 146 of the Civil Code, so far as applicable here, provides:

"In case of the dissolution of the marriage by decree of a court of competent jurisdiction or in the case of judgment or decree for separate maintenance of the husband or the wife without dissolution of the marriage, the court shall make an order for disposition of the community property and for the assignment of the homestead as follows:

"One. If the decree is rendered on the ground of adultery, incurable insanity or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties may deem just."

This section has been interpreted by our courts many times, and its meaning has been well-expressed in *Crouch v. Crouch*, 63 Cal.App.2d 747, at page 756, 147 P.2d 678, at page 682 (hearing denied), as follows:

"* * * In an action for divorce on the ground of extreme cruelty, subdivision 1 of section 146 of the Civil Code confers upon the trial court a wide latitude for the exercise of its judgment and discretion in assigning the community property to the respective parties and in every case it will be presumed that such discretion has been wisely and properly exercised, and though impliedly requiring that more than one-half of the community property shall be awarded to the innocent party, it does not otherwise limit the discretion of the trial court in making the award. The proportion should depend upon the particular circumstances of each case, and where the trial court has exercised a legal discretion this court, though clothed with the power of revision under the statute, will be slow to interfere with that discretion. Sec. 146, Civ.Code; *Knapp v. Knapp*, 23 Cal.App. 10, 136 P. 719; *Thomsen v. Thomsen*, 31 Cal.App. 185, 159 P. 1054; *Eslinger v. Eslinger*, 47 Cal. 62; *Gorman v. Gorman*, 134 Cal. 378, 66 P. 313; *Quagelli v. Quagelli*,

99 Cal.App. 172, 277 P. 1089; Nave v. Nave, 35 Cal.App. 27, 169 P. 253; Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714."

[4] In the instant case plaintiff was awarded a divorce on the ground of extreme cruelty and was, therefore, under the authorities, entitled to more than one-half of the community property. She was awarded 51.13% or more than one-half. As stated in *Crouch v. Crouch*, supra, "the proportion should depend upon the particular circumstances of each case." This must depend upon the sound discretion of the trial judge and there is nothing in the record to indicate that his discretion has been abused.

[5, 6] Plaintiff next contends that she is entitled to interest on the accumulation of her share of the community property. By this, plaintiff means interest on her share of the community which accumulated between July 31, 1948 and August 1, 1951. "Interest is the compensation allowed by law or fixed by the parties for the use, or forbearance, or detention of money." Civ. Code, § 1915. It must be remembered that the husband is the manager of the community property, and though spouses have a present, existing and equal interest in community property, this management and control exists during the continuance of the marriage. Civ. Code, §§ 161a, 172. Thus, where a divorce is pending the power of the husband over the community property exists until the entry of the final decree. The rule was stated in *Chance v. Kobsted*, 66 Cal.App. 434, 437, 226 P. 632, 633:

"* * * Even divorce proceedings pending do not, in themselves, interrupt the husband's powers with respect to the management and control of community property, as the effect of such proceedings is not to take the property into the custody of the court. The husband continues to have control of it and full power to dispose of it."

This reasoning was expressly affirmed in *In re Cummings, D. C.*, 84 F. Supp. 65, at page 69. Here defendant had the legal management and control of the community

property in question until the entry of the final decree, or at least until they stipulated to final date of accounting. This being the case he can hardly be said to have been "using forbearing or detaining" money of appellant. We are unable to see how plaintiff would be entitled to any interest on her share, under the definition of "interest" found in Civil Code, § 1915. If defendant had invested the community property and received an increment or interest thereon, appellant would be entitled to her share thereof. 3 Cal.Jur. 10-Yr. Supp., Community Property, § 44; Civ. Code, §§ 164, 687. But plaintiff has made no such showing. Therefore, since defendant had legal control and management of the community property, he should not be charged with interest thereon in plaintiff's favor.

Plaintiff's final three contentions are so closely related that we shall discuss them together. They are: (1) That the trial court erred in entering the final decree on November 1, 1951; (2) that the original interlocutory decree was reversed by the prior appeal as to the determination and division of community property; (3) that the trial court should have entered a new interlocutory decree after the hearing resulting from the prior appeal.

We find no merit in any of these contentions. Upon the former trial plaintiff was granted an interlocutory decree of divorce adjudging that she was entitled to a decree of divorce from defendant and making a division of the community property. Plaintiff filed an appeal from the parts of the judgment relating to the disposition of the community property but did not appeal from the part granting her a divorce. Upon said appeal this court affirmed the interlocutory decree in all respects except that it ordered that the earnings of defendant up to the time of the final decree be considered as community property and that plaintiff be awarded more than one-half of the community property. The interlocutory decree was not reversed in so far as it granted a divorce to plaintiff, and following the retrial as to the limited issues specified by this court, more than one year having

expired after the entry of the interlocutory decree, the trial court did not err in entering a final decree of divorce.

[7] None of the authorities cited by plaintiff deal with a factual situation similar to the one involved in the instant case. To sustain the contentions of plaintiff upon this point would in our opinion create an absurd situation, and neither reason nor authority would support such a holding. Plaintiff brought her action for divorce and she was granted such divorce in the interlocutory decree entered on February 16, 1949. She appealed only as to the portions relating to disposition of property. That appeal was determined on November 25, 1950, as hereinbefore set forth, and was affirmed in all respects except as hereinbefore set forth. After the completion of the trial as to these limited issues relating only to property, the court on November 1, 1951, more than two years and ten months after the entry of the interlocutory decree, entered the final decree of divorce.

Defendant's Appeal

Defendant's sole contention upon his appeal is that he had legitimate expenses in the amount of \$45,323.41, which should have been deducted from the total community property found to be available for division before such division was made. The total community accruing during the accounting period was \$88,224. Plaintiff was awarded \$45,112, and defendant was awarded \$43,112. Defendant contends that if his expenses were allowed there would have been left a balance of only \$44,580.59 available for division. The expenses which defendant contends, should have been deducted

are (a) all payments for alimony, court costs and counsel fees awarded plaintiff, (b) the cost of defendant's own support, and (c) defendant's counsel fees, litigation expense and all other disbursements made by him, regardless of nature, with the single exception of gifts. The trial court found that during the accounting while defendant had numerous expenses for living expenses, pleasure trips, etc., defendant is not entitled to any credit or offset therefor since no such allowance was made to plaintiff, her \$400 a month award being allowed her as a penalty, and if each party were allowed any sum the amount would have to be equal as to each of them, therefore the division is equal whether there is an equal monthly split as to each or the total is divided in half, and a preferential allowance then made to plaintiff. The court also found that the counsel fees and costs of the respective parties must be borne by the respective parties.

[8,9] We believe that the question of what deductions or expenses should be allowed was a matter for the trial court to determine and that upon the record here it cannot be held that the trial court abused its discretion. It must be borne in mind that the plaintiff was awarded a divorce on the ground of extreme cruelty and that the court had a wide discretion in the division of the community property, and likewise the court had a wide discretion in determining what expenses and costs should be allowed.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

CALIFORNIA REPORTER

262 PACIFIC REPORTER

SECOND SERIES

CALIFORNIA REPORTER

262 PACIFIC REPORTER SECOND SERIES

41 Cal.2d 636

CROWLEY v. THOMSON.

L. A. 22577.

Supreme Court of California, in Bank.
Oct. 27, 1953.

Partnership dissolution proceeding. The Superior Court, Los Angeles County, J. A. Smith, J., entered decree dissolving partnership and distributing the assets and defendant appealed. The Supreme Court, Shenk, J., held that where oil lease became worthless while it was a partnership asset such loss should be borne equally by partners, and that loss should have been included in distribution of assets.

Judgment reversed.

Prior opinion, 254 P.2d 607.

Mines and Minerals ◀100

Where partners were engaged in re-drilling oil well, and co-partner assigned oil lease to partnership, and lease had value at time of assignment, but upon dissolution lease was worthless, in view of fact that loss of value occurred while lease was partnership asset, such loss would be borne equally by the partners. Corporations Code, § 15018.

Freda B. Walbrecht, Leslie R. Tarr and Holbrook & Tarr, Los Angeles, for appellant.

Boone & Satchell and James T. Satchell, Long Beach, for respondent.

SHENK, Justice.

Defendant appeals from a judgment for the plaintiff which ordered the dissolution of their partnership and the distribution of its assets. The appeal is on the judgment roll.

Plaintiff and defendant entered into a partnership agreement for the purpose of re-drilling an oil well known as "Bowles No. 1." The agreement in part provided that: (1) Defendant would transfer an oil lease to the partnership subject to an overriding royalty of $7\frac{1}{2}$ percent. ("Bowles No. 1" was on the property covered by this lease.) (2) Plaintiff would contribute 75 percent and defendant 25 percent of the monies necessary to restore and operate the well. (3) Each partner would have a one-half interest in the partnership and share equally in the profits and losses. (4) All questions of control, management, and operation would be determined by the mutual understanding of the partners.

Pursuant to the agreement defendant assigned the lease to the partnership. Plaintiff contributed \$9,000 and defendant \$3,000 to the partnership. After this, plaintiff consulted certain petroleum engineers who advised him that the project upon which the partnership was embarking was economically not feasible. Relying on this information plaintiff refused to consent to further operations of the partnership. The defendant refused to voluntarily dissolve the partnership and distribute its assets and plaintiff brought this action. In the meantime the lease expired because the partnership did not commence drilling operations in time. The defendant cross-complained for damages alleging that plaintiff had wrongfully frustrated the purpose of the partnership.

The trial court found the material allegations of the complaint to be true and those of the cross-complaint to be untrue. It ordered the partnership dissolved. It further ordered that plaintiff be awarded \$9,000 and defendant \$3,000 (certain partnership expenses were deducted from these amounts—

each partner contributing one-half of the total deducted). The now worthless lease was ordered returned to the defendant.

The principal question presented on appeal is whether the distribution of assets ordered by the trial court was correct.

Defendant argues that the lease had value when he assigned it to the partnership. He asserts that its value was \$6,000. His pleadings indicate that he paid \$500 for it, but this is not conclusive of its actual value. He points to Corporations Code section 15018 which provides: "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them * * *." Defendant then refers to paragraph 5 of the agreement which contains the following: "The parties hereto shall share equally in the profits, if any, of the partnership, and * * * the losses, if any, of the partnership shall be borne by and charged against the interest of each partner in the same proportion * * *." He argues that the loss of value of the lease was a partnership loss and should have been borne equally by plaintiff under the provisions of paragraph 5.

When defendant assigned the lease to the partnership pursuant to the agreement the lease had value. The partnership received at least two rights: (1) The right to drill for oil for almost three months, and (2) The right to continued possession if it commenced operations within three months. The fact that defendant paid \$500 to secure the lease indicates that it had value at that time. Subsequent absence of value cannot alter the fact that it had substantial value when it was transferred to the partnership. *Boston Iron & Metal Co. v. S. S. Winding Gulf, D.C., 85 F.Supp. 806, 812; McCormick, Damages, p. 162.* Since the loss of value occurred while the lease was a partnership asset such loss should be borne equally by the partners in accordance with the law and the agreement of the parties.

The trial court made no finding as to the value of the lease at the time defendant assigned it to the partnership. Such a finding should have been made. The amount so found should be added to the \$3,000 which defendant contributed to the partnership in

order to arrive at a total contribution figure. One-half the loss in value of the lease should be subtracted from the plaintiff's share and the other half from defendant's share.

Other questions do not require discussion.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



41 Cal.2d 621

PEOPLE v. ORTEGA.

Cr. 5483.

Supreme Court of California.

Oct. 20, 1953.

Criminal prosecution for murder with three counts of robbery. The Superior Court, Los Angeles County, David Coleman, J., entered judgment of conviction, and assessed death penalty against defendant, and defendant appealed. The Supreme Court, Edmonds, J., held that in absence of error appearing in record or any assignment of error, Supreme Court was without power to substitute its judgment for that of trial court in assessing death penalty.

Affirmed.

1. Homicide ☞253(1)

Robbery ☞24(1)

Evidence sustained conviction for murder in first degree and three counts of robbery.

2. Homicide ☞332(1)

In absence of error appearing in record or any assignment of error, Supreme Court was without power to substitute its judgment for that of trial court in assessing death penalty for murder.

Ellery E. Cuff, Public Defender, and Noel B. Martin, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The trial court, sitting without a jury, found Florentino Ortega guilty of murder in the first degree and of three counts of robbery, and concluded that he was sane at the time the offenses were committed. The appeal from the judgment imposing the death penalty is automatic. Pen.Code, § 1239(b).

The murder occurred during the course of a robbery, by Ortega, of a liquor store owned by Irving Oren. Displaying a gun, Ortega robbed the proprietor of his wallet and then compelled him to lie on the floor while he looted the cash register and cash box. As several customers entered the store, each was ordered to empty his pockets and to lie on the floor, Ortega accompanying his commands with statements that he intended to kill each of them.

One of the customers was the decedent, Rogers. He was forced to a kneeling position facing Ortega. When Rogers turned his pockets out, a dime fell onto his thigh. Ortega approached him and said, "Give me the rest of your money." Rogers replied that he had no more. Pointing to the coin on Rogers' leg, Ortega said, "You are holding out on me; there is a dime." Asked if he wanted the dime placed on the counter, Ortega replied, "No; hand it to me like a man." Given the money, he stepped backwards about two paces and fired a bullet which struck Rogers in the neck, causing his death a few minutes later.

[1] At the trial, the evidence against Ortega consisted of the testimony of various witnesses present at the shooting, who identified him, and a sworn statement made by Ortega in which he freely admitted the robbery and killing. His only defense was that he did not remember the events of that evening, assertedly because of his having consumed a quantity of intoxicating liquor and taken an injection of heroin. This evidence was rebutted by medical testimony and impeached by his earlier state-

ment in which he claimed that the gun went off accidentally. The record fully supports the determination of the trial court.

[2] Ortega's only contention on this appeal is that the punishment should be reduced. However, repeatedly it has been held: "When, as in this case, the trial court is vested with discretion to determine the punishment (Pen.Code, § 190), and there has been no error, this court has no power to substitute its judgment for that of the trial court." *People v. Harrison*, 41 Cal.2d 216, 218, 258 P.2d 1016, 1018; *People v. Dessauer*, 38 Cal.2d 547, 555, 241 P.2d 238; *People v. Thomas*, 37 Cal.2d 74, 78, 230 P.2d 351; *People v. Odle*, 37 Cal.2d 52, 58-59, 230 P.2d 345. Counsel for Ortega points to no error, nor does any appear in the record.

The judgment and the order denying defendant's motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.



41 Cal.2d 623

GUIDI v. STATE et al.
S. F. 18818.

Supreme Court of California, in Bank.
Oct. 23, 1953.

Action against the State and one of its agencies for injuries sustained by plaintiff at state fair grounds when plaintiff was trampled by a horse kept in state fair horse arena and frightened by fire works exhibition at the fair. The Superior Court, San Francisco County, William T. Sweigert, J., granted motion for judgment on the pleadings, and plaintiff appealed. The Supreme Court, Traynor, J., held that the state is acting in a proprietary capacity when it enters into activities at the state fair to amuse and entertain the public, and

it may be sued for injuries resulting from the performance of such activities.

Judgment reversed.

Prior opinion, 252 P.2d 708.

1. Counties ☞141

States ☞112

The state and its instrumentalities and subdivisions are not immune from liability for torts committed while engaged in proprietary or business activities. Government Code, § 16041.

2. States ☞112

Governmental immunity from liability for torts is dependent on the nature of the particular activity that leads to the plaintiff's injury, and not on the identity of the governmental subdivision or agency carrying on the activity, or on fact that the facility in question may also be used for governmental purposes. Government Code, § 16041.

3. Agriculture ☞4(3)

States ☞112

The state is acting in a proprietary capacity when it enters into activities at the state fair to amuse and entertain the public, and thus the consent statute authorized action against the State and State Agricultural Society for injuries to plaintiff who was trampled by a horse stabled in the horse arena under control of State Agricultural Society at the state fair, when that horse became frightened by fireworks exhibition managed by State Agricultural Society. Government Code, § 16041.

Remington Low, Clarence B. Knight and Sidney F. DeGoff, San Francisco, for appellant.

Dana, Bledsoe & Smith and Joseph W. Rogers, Jr., San Francisco, for respondents.

TRAYNOR, Justice.

Plaintiff Gino Guidi brought this action against the State of California, the State

Agricultural Society, and several individual defendants, to recover damages for personal injuries sustained at the state fairgrounds in Sacramento. The trial court granted the motion of the state and the society for judgment on the pleadings, on the ground that the state fair is operated in the state's governmental capacity and that the state and society are therefore immune from suit. Plaintiff appeals from the ensuing judgment in favor of the state and the society.¹ We have concluded that the defense of governmental immunity from liability for tort is not available to the state and the society, and that the judgment must therefore be reversed.

Plaintiff alleged in his complaint: Defendant State Agricultural Society plans, holds, and controls the state fair at Sacramento. At all relevant times, defendant Golden State Fire Works Company was the servant, agent, and employee of defendant State of California, and defendant Douglas Robb was the servant, agent, and employee of defendants L. D. Lockwood and Jane Doe Lockwood. On September 3, 1950, plaintiff paid for his admission to the state fair and entered the fairgrounds. The accident occurred while he was standing near the entrance to the horse show arena. In his first cause of action, he alleges that defendants State of California, State Agricultural Society, and Golden State Fire Works Company "so carelessly and negligently controlled, operated, supervised and maintained the said Fairgrounds and the fire works exhibition at said Fair" that a certain horse, "Murietta Surprise," owned by defendants L. D. Lockwood and Jane Doe Lockwood, "became frightened and was caused to, and it did, run into, knock down and trample the plaintiff," causing severe personal injuries. The second cause of action follows the allegations of the first cause of action, and alleges in addition that defendants State of California and State Agricultural Society "carelessly and negligently failed to maintain the safeguards to protect the public, including the

1. The record does not reveal the present status of plaintiff's action against the other defendants. The judgment in favor of the State of California and the State Agricultural Society is final as to them,

however, and is appealable whether or not the action against the other defendants is still pending. *Rocca v. Steinmetz*, 189 Cal. 426, 428, 208 P. 964.

plaintiff, from the animals stabled, exercised, led and ridden" in the vicinity of the horse arena, so that "Murietta Surprise" was permitted and allowed to knock down and trample plaintiff. The third cause of action follows the allegations of the first cause of action, and alleges in addition that defendants L. D. Lockwood, Jane Doe Lockwood, and Douglas Robb "so carelessly and negligently controlled and maintained" the horse that it became frightened and was caused and permitted to run into and trample plaintiff. Plaintiff alleged compliance with the claim statute. Gov.Code, § 16044.

[1] The state and its instrumentalities and subdivisions are not immune from liability for torts committed while engaged in proprietary or business activities. Gov. Code, § 16041; *People v. Superior Court*, 29 Cal.2d 754, 761-762, 178 P.2d 1; *Muses v. Housing Authority*, 83 Cal.App.2d 489, 502, 189 P.2d 305. In the present case, it appears from the complaint that one or both of two activities conducted by the state or its agents led to plaintiff's injuries: the exhibition of fireworks and the maintenance of the horse arena. The only question to be determined on this appeal is whether as a matter of law such activities are governmental.

[2] Defendants contend that the state fair is organized and operated solely to interest and educate the general public in agricultural and industrial subjects, a governmental activity, and that the maintenance of the horse arena and exhibition of the fireworks are likewise governmental activities since they are connected with the operation of the fair. Governmental immunity, however, turns on the nature of the particular activity that leads to the plaintiff's injury, not on the identity of the governmental subdivision or agency carrying on the activity, or on the fact that the facility in question may also be used for governmental purposes. *Chafor v. City of Long Beach*, 174 Cal. 478, 488, 163 P. 670, L.R.A. 1917E, 685; *Rhodes v. City of Palo Alto*, 100 Cal.App.2d 336, 341, 223 P.2d 639; *Boothby v. Town of Yreka City*, 117 Cal. App. 643, 651, 4 P.2d 589; *Bertiz v. City of Los Angeles*, 74 Cal.App. 792, 797, 241' P.

921. Thus, in *People v. Superior Court*, supra, 29 Cal.2d 754, 178 P.2d 1, we held that the State Belt Railroad was operated by the State Harbor Commission in a proprietary capacity, although that agency prevented and extinguished fires on the waterfront in its governmental capacity. 29 Cal.2d at page 760, 178 P.2d at page 4. Similarly, in the present case we are not concerned with the possible immunity of the state from liability for negligence in connection with agricultural and educational activities at the state fair, but only with its claim of immunity for negligence in the course of setting off fireworks and maintaining the horse arena.

Most of the decisions relied upon by defendants are factually dissimilar to the present case. Two decisions, however, require discussion. In *Melvin v. State*, 1898, 121 Cal. 16, 53 P. 416, a spectator at a horse race at the state fair in Sacramento was injured by the collapse of the grandstand owing to the negligent maintenance thereof by the State Agricultural Society. It was held that plaintiff could not bring an action against the state. The accident took place, however, in 1891, two years before the passage of the consent statute relied upon by plaintiff in the present case. Stats.1893, p. 57; now Gov.Code, § 16041. Since it had previously been held that the consent statute was not retroactive, *Chapman v. State*, 104 Cal. 690, 693, 38 P. 457 the *Melvin* decision did not decide whether an action could be maintained thereunder, *People v. Superior Court*, supra, 29 Cal.2d 754, 759, 178 P.2d 1; *Talley v. Northern San Diego County Hosp. Dist.*, 41 Cal.2d 33, 257 P.2d 22, and, accordingly, is not controlling here. Defendant also relies on *Dillwood v. Riecks*, 1919, 42 Cal.App. 602, 184 P. 35. There, plaintiff's horse was destroyed by a fire at a stable on county fairgrounds, through the negligence of county employees. Plaintiff contended that the county operated the fairgrounds in its proprietary capacity, relying upon *Chafor v. City of Long Beach*, supra, 174 Cal. 478, 163 P. 670. The court held that the county could not act in a proprietary capacity, on the ground that "counties being but agencies of the state their

functions are exclusively governmental, and are such only as are imparted to them by the state." 42 Cal.App. at page 608, 184 P. at page 38. The Dillwood case is directly contrary to our decision in *People v. Superior Court*, supra, 29 Cal.2d 754, 178 P.2d 1, where we held that the state and, necessarily, its subdivisions, may act in a proprietary capacity. See, also, *Muses v. Housing Authority*, supra, 83 Cal.App.2d 489, 502, 189 P.2d 305. The Dillwood case is disapproved insofar as it holds that counties may act only in a governmental capacity.

In several cases municipal corporations either engaged in activities for the amusement and recreation of their citizens or allowed their property to be used for such purposes, and it was held that they acted in a proprietary capacity. Thus, in *Chafor v. City of Long Beach*, supra, 174 Cal. 478, 163 P. 670, the city authorized free use of the municipal auditorium by the Sons of St. George to celebrate Queen Victoria's birthday. The public was invited. A parade led by the municipal band terminated at the auditorium. The approach to the auditorium collapsed under the weight of the crowd seeking admission to attend further festivities. Similarly, in *Sanders v. City of Long Beach*, 54 Cal.App.2d 651, 129 P.2d 511, 516, the same auditorium was used by the city to advertise itself and entertain the public during "Know Your City Week" by giving information concerning the various activities of departments of the city. Plaintiff was injured while attending motion pictures at a room in the auditorium. Again, in *Rhodes v. City of Palo Alto*, 100 Cal.App.2d 336, 223 P.2d 639, the city recreation department operated a community theater in a public park for the entertainment of its citizens. Plaintiff was injured while attending the reading of a play at the theater.

[3] In our opinion, the *Chafor*, *Sanders*, and *Rhodes* cases, supra, are controlling here, and require the conclusion that the state is acting in a proprietary capacity when it enters into activities at the state fair to amuse and entertain the public. The activities of defendants do not differ from those of private enterprise in the entertainment industry. As in *People v. Supe-*

rior Court, supra, the state, by its agents, committed the tort while engaged in a proprietary activity, and the trial court therefore erred in concluding that the consent statute did not allow maintenance of the action. The statements in *Melvin v. State*, supra, 121 Cal. 16, 22, 53 P. 416, indicating that the State Agricultural Society engages in governmental activities only in conducting the state fair are inconsistent with the foregoing cases and are disapproved.

The judgment is reversed.

GIBSON, C. J., and EDMONDS, CARTER, SCHAUER, and SPENCE, JJ., concur.



41 Cal.2d 608

BURGE v. CITY AND COUNTY OF SAN FRANCISCO.

S. F. 18876.

Supreme Court of California.

In Banc.

Oct. 20, 1953.

Minor's personal injury action, brought by minor's father, as guardian ad litem, wherein defendant relied upon fact that compromise negotiated with minor's mother had been approved in judicial proceeding. The Superior Court, San Francisco County, I. L. Harris, J., entered judgment for defendant, and plaintiff appealed. The Supreme Court, Traynor, J., held that although divorce decree gave parents joint custody and control of their minor child, where mother was awarded personal custody, and thus the physical custody and care of the child, she had authority to compromise minor's claim for personal injuries.

Affirmed.

Carter, J., dissented.

Prior opinion, 256 P.2d 382.

I. Infants 105

Where judicial proceeding was entitled an application for order approving com-

promise of disputed claim entered by named minor, and verified petition recited that it was the compromise of the minor's claim, not claim of minor's mother, for which approval was sought, and order recited that it was upon reading and filing of that petition that it appeared to the court that the compromise offer was reasonable, although order recited that it approved a disputed claim for the minor that the named mother had against the defendant, there could be no doubt that the court approved a compromise of the minor's claim against defendant by such order.

2. Judgment ⚭495(1), 497(1)

Ordinarily, where order or judgment of court of general jurisdiction is collaterally attacked, only evidence that may be considered in determining whether order or judgment is void is the record in the proceeding in which it was entered, but if record is silent as to existence of a jurisdictional fact, that fact will be presumed.

3. Judgment ⚭496, 499

Where proceeding is wholly statutory and unknown to common law, court, even though ordinarily one of general jurisdiction, is a court of special jurisdiction for that proceeding, and if jurisdictional facts do not appear of record in such proceeding, there is no presumption of regularity, but extrinsic evidence is admissible to prove such fact so that failure of record in such proceeding to recite jurisdictional fact does not make record void, except where statute makes record exclusive mode of proof.

4. Parent and Child ⚭8

Generally, in absence of statutory authority, a parent, as such, cannot compromise or release his child's cause of action. Probate Code, § 1431.

5. Infants ⚭112

In collateral attack on order approving compromise of minor's claim for injuries, extrinsic evidence was admissible to establish jurisdictional fact. Probate Code, § 1431.

6. Parent and Child ⚭8

To establish right of mother to compromise minor's disputed claim, it must be

shown, if father is not dead, that father and mother are living separate or apart, that mother had care or custody of minor, that compromise has approval of Superior Court of County where minor resides, and that verified petition in writing seeking approval of compromise has been filed with such court. Probate Code, § 1431.

7. Infants ⚭84

A hearing on verified petition for approval of compromise of minor's claim for personal injuries is not required by statute authorizing such procedure, and, therefore, order approving such compromise was not invalid because entered without a hearing. Probate Code, § 1431; Rules of Superior Court, rule 28(c).

8. Parent and Child ⚭2(2)

Even though living apart, parents are both entitled to custody of their minor children unless one is unable or refuses to take custody, or has abandoned his or her family, or unless the sole custody of the children has been awarded to one of them. Civ.Code, § 197.

9. Parent and Child ⚭8

Within statute relating to compromise of minor's claim by parent having care or "custody," the quoted word means complete or exclusive custody. Probate Code, § 1431.

See publication Words and Phrases, for other judicial constructions and definitions of "Custody".

10. Parent and Child ⚭2(1), 5(1)

"Custody" of a minor embraces the sum of parental rights with respect to rearing of the minor, including its care, and includes the right to minor's services and earnings and right to direct his activities and make decisions regarding his care and control, education, health, and religion. Civ.Code, § 197.

11. Parent and Child ⚭8

Within statute authorizing compromise of minor's claim by parent having "care or custody" of the child, the word "custody" means complete custody or all the rights involved in custody and the word "care" means what is commonly called "physical

custody" or the custodial rights involved in the physical care and control of the child. Probate Code, § 1431.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Care" and "Physical Custody".

12. Parent and Child ⚖8

Although divorce decree gave parents joint custody and control of their minor child, where mother was awarded personal custody, and thus the physical custody and care of the child, she had authority to compromise minor's claim for personal injuries. Probate Code, § 1431.

John F. O'Sullivan, San Francisco, Millington, Dell'Ergo, Weeks & Morrissey, Redwood City, for appellant.

Dion R. Holm, City Atty., and Clayton W. Horn, Deputy City Atty., San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff Lyndle E. Bürge, a minor, by his father as guardian ad litem, brought this action against defendant City and County of San Francisco to recover damages for personal injuries suffered by him while he was a passenger on a street-railway car operated by defendant. Defendant filed an answer pleading as a special defense that plaintiff's claim had previously been compromised by his mother in a proceeding under section 1431 of the Probate Code. The issue so raised was tried separately pursuant to section 597 of the Code of Civil Procedure. The court concluded that the order approving the compromise was not subject to collateral attack and entered judgment in favor of defendant. Plaintiff appeals. He concedes that the attack is collateral but contends that the court

had no jurisdiction to approve the compromise on the grounds that the petition for approval of the compromise and the order approving it were fatally defective in failing to recite jurisdictional facts and that even if these facts could be proved in the present proceeding the record therein discloses that his mother was without authority to compromise his claim. We have concluded that this contention cannot be sustained and that the judgment must therefore be affirmed.

Plaintiff was fourteen years old at the time of the accident. His father and mother had previously been divorced. The interlocutory decree provided that "plaintiff [father] and defendant [mother] have joint custody and control of the said minor children, with personal custody in the defendant, and the plaintiff has the right and privilege to visit said minor children and take them out at all reasonable times." Plaintiff was one of the minor children mentioned in the decree and lived with his mother after the divorce.

All negotiations leading to the compromise were conducted between plaintiff's mother and defendant. Plaintiff's father knew that the accident had occurred and that a claim had been filed, but he did not participate in the compromise proceedings or become aware of the compromise until after it had been made. Plaintiff's mother agreed to release his claim against defendant upon the payment of \$500. She filed with the superior court a verified petition seeking approval of the compromise, and it was approved. Defendant paid the \$500 and plaintiff's mother executed a release. The present action was brought before plaintiff reached majority.

[1] The verified petition ¹ and the order

1. "The petition of Ova Burge respectfully shows:

"(1) That petitioner is the mother of Lyndle Burge, a minor, age fourteen, and that both petitioner and the minor are residents of the City and County of San Francisco.

"(2) That minor had disputed claim for money against the City and County of San Francisco for injuries sustained

by minor when an accident occurred on August 29, 1945, at Duboce and Fillmore Streets involving a collision of Streetcars 'N' and #22, operated by the City and County of San Francisco.

"(3) That said City and County of San Francisco offered to pay in compromise of said claim the sum of Five Hundred (\$500.00) Dollars, which, in the opinion of petitioner is a reasonable compromise,

approving the compromise² are set forth in the footnotes. Plaintiff contends at the outset that the court failed to approve the compromise, on the grounds that the order recites that it approved a "disputed claim for minor that Iva Burge has against" defendant and that such a claim is not the claim of plaintiff against defendant. There is nothing to show that there was any need for a judicial proceeding to approve a compromise of any claim of her own that plaintiff's mother may have had against defendant. The proceeding was entitled "Application of Iva Burge for an order approving the compromise of disputed claim entered by a minor, Lyndle Burge." The verified petition recited that it was the compromise of the minor's claim for which approval was sought, and the order recited that it was upon the reading and filing of that petition that it appeared to the court that the compromise offer was reasonable. Although the order made a slipshod description of the claim that was being compromised, when it is read with the petition, there can be no doubt that the court approved a compromise of plaintiff's claim against defendant.

[2,3] It is plaintiff's principal contention that the court lacked jurisdiction to compromise his claim. Ordinarily when an order or a judgment of a court of general jurisdiction is collaterally attacked, the only evidence that may be considered in determining whether the order or judgment is void is the record in the proceeding in which it was entered. If the record is silent as to the existence of a jurisdictional fact, that fact will be presumed. In re Guardianship of Hall, 31 Cal.2d 157, 164, 187 P.2d 396; Wells Fargo & Co. v. City and County of San Francisco, 25 Cal.2d 37, 40, 152 P.2d

625; cf. Thompson v. Cook, 20 Cal.2d 564, 569, 573, 127 P.2d 909. It has been held, however, that if a proceeding is wholly statutory and unknown to the common law, the court, even though ordinarily one of general jurisdiction, is a court of special jurisdiction for that proceeding, and if jurisdictional facts do not appear of record in such a proceeding, there is no presumption of regularity. In re Estate of Sharon, 179 Cal. 447, 457-458, 177 P. 283; 49 C.J.S., Judgments, § 425, p. 840; cf. In re Estate of Kay, 30 Cal.2d 215, 220-221, 181 P.2d 1. If the presumption is not applicable, however, failure of the record in such a proceeding to recite a jurisdictional fact "does not make the judgment void, for extrinsic evidence is admissible to prove such fact, except where some statute makes the record the exclusive mode of proof." Estate of Sharon, supra, 179 Cal. at page 458, 177 P. at page 288.

[4,5] It is the general rule that without statutory authority a parent, as such, cannot compromise or release his child's cause of action. See, 103 A.L.R. 500; 39 Am.Jur. 629. It has been held, however, that proceedings under section 1431 are entitled to the presumption of regularity. Rico v. Nasser Bros. Realty Co., 58 Cal.App.2d 878, 882, 137 P.2d 861. Plaintiff, relying on the Sharon case, supra, contends that the Rico case was erroneously decided. Defendant, on the other hand, contends that the Hall and Wells Fargo cases, supra, are controlling. It is unnecessary, however, to resolve these contentions if the jurisdictional facts are established by the extrinsic evidence.

[6] Under section 1431, to establish the right of the mother to compromise a minor's disputed claim, it must be shown, if the father is not dead, that (1) the father

and that it will be in the best interests of said minor if said compromise is accepted by this Court.

"Wherefore, petitioner prays that the Court approve said compromise and direct that said money be paid to her without the filing of any bond.

"Iva Burge
"Petitioner"

2. "Upon reading and filing the verified petition of Iva Burge for an order ap-

proving compromise of the disputed claim for minor that Iva Burge has against the City and County of San Francisco, and it appearing to the Court that the compromise offer is reasonable,

"It Is Hereby Ordered that said compromise be and it is hereby approved, and that the said City and County of San Francisco, is hereby directed to pay the sum of Five Hundred (\$500.00) Dollars to Iva Burge, a minor, without the filing of any bond."

and mother are living separate or apart; (2) the mother has the care or custody of the minor; (3) the compromise has the approval of the superior court of the county where the minor resides; and that (4) a verified petition in writing seeking approval of the compromise has been filed with such court.

[7] Plaintiff contends that a hearing on the petition is also required. Plaintiff and his mother testified in the present proceeding that neither was present in court when the order approving the compromise was made and that no testimony was taken relating to the extent of his injuries or the fairness of the compromise. The trial court granted defendant's motion to strike this testimony. No error appears. Although it would ordinarily be better practice³ to hold a hearing and take testimony, the statute does not require it. *Rico v. Nasser Bros. Realty Co.*, supra, 58 Cal.App.2d 878, 881, 137 P.2d 861. Plaintiff relies on *Berry v. Chaplin*, 74 Cal.App.2d 652, 169 P.2d 442, for a contrary rule. There, however, the proceeding was under section 196a of the Civil Code. The court was careful to point out that even if section 1431 were deemed to apply to actions by a child under section 196a, see, 2 *Armstrong, California Family Law*, p. 1084, no attempt had been made to compromise the child's claim thereunder, since the parent had never filed a verified claim for approval of the compromise as required by section 1431. 74 Cal. App.2d at page 660, 169 P.2d 442. Insofar as the court intimated that a hearing would be necessary had the proceeding been under section 1431, the statement was unnecessary

to the decision in the case and is contrary to *Rico v. Nasser Bros. Realty Co.*, supra.

The verified petition and the order approving the compromise disclose that requirements (3) and (4) above were met, but do not disclose that (1) the father and mother were living separate or apart or that (2) the mother had the care or custody of plaintiff. Extrinsic evidence, however, established that the father and mother were divorced and were living apart at the time of the compromise. The controlling question that remains, therefore, is whether it was also proved that the mother then had the "care or custody" of plaintiff. To answer that question we must first determine what the Legislature meant by the terms "care or custody".

Until 1939, section 1431 of the Probate Code provided that a disputed claim of a minor could be compromised by his mother only if "his father is dead or has deserted or abandoned him". It was held that under this wording of the section the mother could not compromise a claim when the parents were divorced, even though the mother had been awarded custody of the minor. In *re Parrino*, 1937, 24 Cal.App.2d 128, 74 P.2d 549. The decision in the *Parrino* case prompted the Legislature in 1939 to re-examine section 1431 of the Probate Code. It amended the section to provide that a claim of a minor against a third person may be compromised by "his father, or if his father is dead or the parents of said minor are living separate or apart and his mother then has care or custody of said minor then his mother".⁴ The amendment not only met the situation of the *Parrino*

3. Rule 28(c) of the Superior Court Rules (33 Cal.2d 14, effective January 1, 1949, which was after the compromise in this case) provides: "Upon the hearing of the petition, the person compromising the claim on behalf of the minor or incompetent and the minor or incompetent shall be in attendance unless for good cause the court dispenses with such personal appearance. The court may require the presence and testimony of the attending or examining physician, as well as other evidence relating to the merits of the claim, the nature and extent of the in-

jury, care, treatment and hospitalization." Attendance of the parties and the taking of evidence is even today not mandatory and a compromise can still be effected without such testimony and attendance, if, in the discretion of the trial judge, good cause is shown. As to the taking of testimony, the word "may" is of course permissive.

4. A similar amendment was made in 1939 to section 376 of the Code of Civil Procedure, but was removed in 1949. Cf. *Espinosa v. Haslam*, 1935, 8 Cal.App.2d 213, 47 P.2d 479.

case but extended the mother's authority in other respects. The Parrino case problem could have been met by simply adding to the old phrase the words "or for other reasons" the mother has custody of him." Instead, the Legislature substituted a complete new phrase. The broad language of the new phrase covers not only a case of desertion or abandonment but any case where the father and mother are living separate or apart,⁶ whether the reason therefor be desertion, abandonment, agreement of the parties or divorce. Furthermore, by using the word "custody" the Legislature made it clear that if the mother and father are living separate or apart, the mother has authority to compromise if she has custody of the minor, whether she has that custody by virtue of the father's abandonment of his family, his inability or refusal to take custody, or by virtue of a court order awarding her custody.

[8,9] An award of joint custody with the father would not, however, be sufficient to give the mother authority to compromise. Even though living apart, the parents are both entitled to custody unless one is unable or refuses to take custody or has abandoned his or her family, Civ.Code, § 197, or unless the sole custody of the child has been awarded to one of them. *Watkins v. Clemmer*, 129 Cal.App. 567, 574, 19 P.2d 303. A divorce decree that awards the parents joint custody leaves the right to custody as it was during the marriage when they were living together and gives neither a greater right than he or she had before the divorce. Custody as used in section 1431 therefore means complete or exclusive custody.

5. Under section 197 of the Civil Code, the mother is entitled to custody if the father is dead or has abandoned his family, or is unable or refuses to take custody.

6. This language was probably suggested by Civil Code section 198, which provides: "The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other."

Had the Legislature used only the word "custody" instead of the words "care or custody" there could be no doubt that it meant to limit the mother's authority to compromise to cases in which she has custody. Had it meant to make both care and custody a condition to the mother's authority to compromise it would have used the word "and" instead of the word "or."⁷ The addition of the words "care or" seems therefore to indicate a clear legislative purpose not to limit the mother's authority to cases in which she has custody.

It has been suggested that the words "care or" were added to the statute only for cases in which custody has not already been adjudicated, to relieve the court, because of the difficult factual and legal questions that may be involved, of the necessity of having to determine whether or not the mother has custody of the minor. In such cases it is necessary to establish only that the mother has care of the minor, but if the custody has already been adjudicated, and the mother has not been awarded custody, she has no authority to compromise, even though she has the care of the minor. Under this interpretation, even if the father has not abandoned his family and is able and willing to take custody and the mother does not therefore have custody, she may nevertheless compromise if she has the care of the minor. If the reason she does not have custody, however, is a previous adjudication of custody, she cannot compromise even though she has the care of the minor. Thus in some cases "care" would be controlling, and it would be immaterial that the mother did not have custody of the minor. In other cases "cus-

7. The legislative history of Assembly Bill No. 1082, amending section 1431 in 1939, indicates that the statute was deliberately written in the disjunctive. As introduced, the bill provided that the mother could compromise a claim of a minor "if his father is dead or the parents of said child are living separate and apart and his mother then has custody." The bill as finally passed provided, "if his father is dead or the parents of said minor are living separate or apart and his mother then has *care or custody*". (Changes indicated by italics.)

tody" would be controlling, and it would be immaterial that the mother had "care" of the minor.

The statute, however, no more admits of limiting "care" to some cases of care than it does of limiting "custody" to some cases of custody. The child may actually be taken care of in an institution or by a stranger or relative and yet the mother may have custody of it, including the right to its care, by virtue of the father's abandonment of his family or his inability or refusal to take custody. In such a case the mother would have the right to compromise, since the Legislature did not limit "custody" to custody derived from a court order. There is nothing in the statute to indicate that "custody" has a double meaning, that in cases in which it is necessary to establish custody before a compromise can be approved it is to be interpreted as meaning custody however derived, but for the purpose of rendering "care or" meaningless, it is to be interpreted as meaning custody derived from a court order when there is such an order. Had the Legislature meant to give either "care" or "custody" alternative meanings or to make either controlling in some cases and not in others, it would have said so. It placed these words in the statute unmodified by other words that would suggest that they were not of equal force or were not to be applied in the disjunctive in all cases. We are not at liberty to restrict and expand at will the application of these words or to seek hidden meanings in them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.

Plaintiff contends that "care or custody" mean the same thing and that the Legislature therefore did not give the mother authority to compromise a minor's claim in cases in which she does not have custody. The words "care or," however, were deliberately added, and cannot be regarded as superfluous, if a reasonable construction thereof will give effect to them and preserve all the other words of the statute.

[10] Custody embraces the sum of parental rights with respect to the rearing

of a child, including its care. It includes the right to the child's services and earnings, Civ.Code, § 197, and the right to direct his activities and make decisions regarding his care and control, education, health, and religion. *Lerner v. Superior Court*, 38 Cal.2d 676, 681, 242 P.2d 321; see, 2 *Armstrong*, California Family Law, p. 954. These rights are exercised by both parents in an undivided home, Civ. Code, § 197, and differences between them are ordinarily resolved at home without the necessity of invoking the aid of a court. When the parents are living separate or apart, however, there are apt to be not only frequent differences of opinion with respect to any of the matters involved in custody, but frequent resort to courts for their settlement. In such cases a court may conclude that the best interests of the child and due regard for the interests of the parents require that one or the other be given complete custody of the child. It may conclude that such action would be unjust, and unable like Solomon to carve the child, it may carve out of the sum of custodial rights, certain rights to be exercised by each parent. Thus it is common practice in divorce cases for the court to award "legal custody" to one or both parents and "physical custody" to one parent with or without the right of visitation by the other parent, or physical custody may even be awarded to a third person, usually a relative. Decisions made in the exercise of the rights awarded are not necessarily final, for the court's orders are subject to modification. Civ.Code, § 138; *Cooney v. Cooney*, 25 Cal.2d 202, 205, 153 P.2d 334, and cases cited.

[11] We believe the Legislature had this practice in mind when it used the words "care or custody." By "custody," it meant complete custody or all the rights involved in custody. By "care" it meant what has commonly been called "physical custody" or the custodial rights involved in the physical care and control of the child. The Legislature was also aware that in many cases fathers and mothers may be living apart where there have been no divorce or other proceedings adjudicating the right to custody. It may

be unknown where the father is or uncertain whether or not he has forfeited his rights to custody. (See, 2 Armstrong, California Family Law, p. 1006 et seq.) In such cases, if the mother has the care of the child, it is not necessary that there also be a judicial determination that she has his complete custody. Thus, if the parents are living separate or apart, and the mother has the care or physical custody of the child, she may compromise his claims even though she may or may not also have his complete custody.

[12] In the present case, the parents were living apart and the child lived with his mother. Under the divorce decree the parents had "joint custody and control" but the mother had "personal custody." There can be no doubt that the award of personal custody gave her the physical custody and care of the child. Having the care of the child, she had authority under section 1431 of the Probate Code to compromise the claim in question.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER and SPENCE, JJ., concur.

CARTER, Justice (dissenting).

I dissent.

At the time this matter arose, section 1431 of the Probate Code provided, in part, that when a minor has a disputed claim for damages "his father, or if his father is dead or the parents of said minor are living separate or apart and his mother then has *care or custody* of said minor then his mother, shall have the right to compromise, or execute a covenant not to sue * * *." (Emphasis added.)

Although it did not appear in the mother's petition for approval of the settlement of the minor's claim, or in the court's order of approval, that the father was dead, or that the child's parents were living separate or apart, or that she had the care or custody of the child, extrinsic evidence showed that the parents were divorced and that by court

decree, they were given *joint* legal custody with "personal" custody in the mother.

A majority of this Court has determined that the words "care or custody" were intended by the Legislature to give the mother authority to compromise a disputed claim if she had the care of the child whether or not she had custody of him. "The addition of the words 'care or' seems therefore to indicate a clear legislative purpose not to limit the mother's authority to cases in which she has custody." This holding, of course, makes a nullity of the court order awarding joint custody to both parents with physical, or personal, custody in one of them. With separated, or divorced, parents, it is impossible for both to have personal custody of the child—one must have it since, as pointed out in the majority opinion, the court cannot "like Solomon * * * carve the child". We have held, *Lerner v. Superior Court*, 38 Cal.2d 676, 242 P.2d 321, that custody includes the right to direct the child's activities and make decisions regarding his care, control, education, health and religion. The father here, by court order, had the rights above enumerated but a majority of this Court interprets the statute so as to deprive him of a voice in making a major decision having to do with the child's future welfare, education and health. The majority concedes, as indeed it must, that an award of joint custody with the father would not be sufficient to give the mother authority to compromise and yet it is held that because the mother had the person of the child in her care, she did have the authority. As I have heretofore pointed out, when parents are living separate and apart, the person of the child must be with one or the other but the decree giving them joint custody gives neither a greater right to control than either had before the divorce.

I am of the opinion that the use of the words "care or custody" by the Legislature was intended to take care of the situation where there was no court order giving custody to one, or both, parents or where the mother had the care of the child because the father had abandoned or deserted his family and his whereabouts were unknown. Under

the interpretation of the majority, the mother, having physical custody and care of the child, could compromise a claim for him even though sole legal custody had been awarded to the father or even if she had the care of the child for a week, or a week end, with sole custody in the father. For example, it is said "If the reason she does not have custody, however, is a previous adjudication of custody, she cannot compromise even though she has the care of the minor. Thus in some cases 'care' would be controlling, and it would be immaterial that the mother did not have custody of the minor. In other cases 'custody' would be controlling, and it would be immaterial that the mother had 'care' of the minor." It appears to me that if there has been no formal adjudication of custody, and one parent has the care of the minor, because the other has abandoned it, that is a matter easily established in the petition for approval; or, on the other hand, if custody has been formally adjudicated, that matter also may be established. If one parent had legal custody, and the other had the temporary care of the child, the one having temporary care would hardly be the one authorized to compromise a claim which might have a far-reaching effect on the child's future. It is said that under this interpretation, if the parents are separated even if the father has not abandoned the child, and is ready and able to take custody but custody has not been adjudicated to the mother, she having the care of the child, may compromise his claim. Since the matter of the parents living separate and apart *should* appear in the petition for approval, Prob.Code, § 1431, the court could, before approving the settlement, require the father's consent thereto since neither parent has a greater right than the other.

The words "care" and "custody" were used in the disjunctive to take care of two different situations and to interpret them as I think they should be interpreted would give effect to both words and would not make a nullity out of a court order awarding custody to one, or both, parents. As the majority interprets them, the word "custody" means nothing if the mother has the "care" of the minor.

Since it seems clear to me that the mother had no authority to compromise the claim of the minor, I would reverse the judgment.



41 Cal.2d 628

PEOPLE v. ROBARGE.

Cr. 5467.

Supreme Court of California.

In Banc.

Oct. 23, 1953.

Prosecution for first degree robbery. The Superior Court, Los Angeles County, Irvin Taplin, Judge pro tem., entered judgment of conviction, and entered order denying motion for new trial, and defendant appealed. The Supreme Court, Gibson, C. J., held, inter alia, that evidence was not as a matter of law insufficient to support the judgment but the trial judge should have made his own conclusion as to sufficiency of the evidence, rather than merely accepting the jury's conclusion.

Judgment and order vacated with directions.

Prior opinion, 255 P.2d 877.

1. Robbery ☞26

Evidence as to identification of defendant as person who had perpetrated robbery for which prosecution was brought was not insufficient as a matter of law to support the judgment of conviction.

2. Criminal Law ☞706

In prosecution for first-degree robbery, wherein issue was raised as to identity of defendant as the robber, prosecution was entitled to explore defendant's alibi and to question witness, who had testified that he had seen defendant at a certain cafe on night robbery was committed, with respect to persons who were in the cafe at the time, and question concerning time witness first learned of robbery was not calculated to implicate defendant's brother as other participant in robbery, though witness' answer

brought out fact that the brothers had been arrested for the crime, and did not constitute misconduct on part of district attorney.

3. Criminal Law ☞393(1)

Action of police in placing dark glasses on person suspected of robbery at time he was identified at police station was not in violation of such person's constitutional rights.

4. Criminal Law ☞737(1), 935(1)

It is the exclusive province of jury to find facts in criminal case, but it is duty of trial court to see that jury's function is intelligently and justly performed, and in exercise of its supervisory power over verdict, the court, on motion for new trial, should consider probative force of evidence and satisfy itself that evidence as a whole is sufficient to sustain the verdict.

5. Criminal Law ☞1156(2)

In passing upon accused's motion for new trial, trial judge has very broad discretion and is not bound by conflicts in evidence, and reviewing courts are reluctant to interfere with decision granting or denying such motion unless there is a clear showing of abuse of discretion.

6. Criminal Law ☞1158(1)

Where trial judge in denying accused's motion for new trial indicated clearly that he entertained serious doubts as to validity of identification, but that he was bound by contrary conclusion of jury, trial judge failed to give defendant benefit of his independent conclusion as to sufficiency of credible evidence to support verdict, and judgment of conviction and order denying motion for new trial would be vacated with directions to again hear and determine the motion.

7. Criminal Law ☞994(3)

Where judgment of conviction and order denying motion for new trial were vacated with directions to again hear and determine the motion, the time limits provided in Penal Code for entry of judgment, etc., would run from filing of remittitur in superior court. Pen.Code, §§ 1168, 1191, 1193, 1200, 1202, 1207, 1213.

Wilfred Wells Robarge, in pro. per., and Albert Garber, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant, who admitted three prior felony convictions, was found guilty by a jury of robbery in the first degree. He appeals from the judgment and from an order denying his motion for a new trial, contending that the evidence is insufficient to support the verdict; that the district attorney was guilty of prejudicial misconduct; that his constitutional rights were violated by the police when, before trial, a pair of dark glasses was placed over his eyes at the suggestion of a witness who had been asked to identify him; and that the court misconceived its duty in passing on the motion for a new trial.

About three o'clock in the morning of March 5, 1951, the Clock Drive-In restaurant located in the county of Los Angeles was robbed by two men. One of the men entered the office of the restaurant, where the manager and the cook were checking the day's receipts, and announced, "This is a stick-up." With a gun in his hand he ordered the manager to open the safe and then directed him and the cook to lie down on the floor. The other robber, who was wearing a hat and dark glasses, met Manus, a dishwasher, as he was leaving the kitchen for the washroom, pointed a gun at him and ordered him to move to a place near the office door. This robber then saw Muldrow, the janitor coming down the hallway and, after some exchange of words, forced him to join Manus. Muldrow and Manus were "backed" into the office and forced to lie on the floor with the cook and the manager. The robbers took \$3,300, tore the telephone from the wall, and turned off the lights.

The cook and the manager, because of their positions on the floor, were unable to see the man who forced Manus and Muldrow to enter the restaurant office. The prosecution claims that this man, who will hereafter be referred to as "the robber,"

was defendant. Six weeks after the robbery Muldrow saw defendant at a police station and was asked by the officers if he could identify him. Muldrow answered that if the man would put some glasses on, he "could tell more about him." The police officers placed a pair of dark glasses on defendant, and Muldrow then identified him as the robber. At the trial Muldrow testified that he had a "good look" at the robber in the hallway, and he was positive that defendant was the same man. Manus testified that defendant's features resembled those of the robber and that defendant appeared to be about the same height, but that he could not state positively that defendant was the robber.

Although defendant did not take the stand, there was testimony on his behalf that he was several miles away from the scene of the crime at the time the robbery was committed. A witness named Buttrey testified that he saw defendant that night at a place called Top's Cafe, which was located approximately ten miles from the Clock Drive-In. He said that defendant entered Top's Cafe about a quarter of two, stayed twenty or thirty minutes and left alone. Defendant's former wife testified that at twenty minutes past two he picked her up at the place where she was working near Top's Cafe and drove her to her mother's home. She said that they parked in front of the house and stayed in the car from two-thirty until four o'clock. Her mother testified that she saw them there, recognized defendant, and waited for her daughter to come in.

[1] Defendant contends that the testimony of Muldrow was inherently improbable and that, therefore, there was merely an apparent conflict in the evidence which should not be resolved in favor of the verdict. When questioned at the preliminary hearing, Muldrow demonstrated by a gesture that the robber was a certain height, and according to statements in the record the height indicated was about 4 feet. At the trial Muldrow stated that the robber was about 5 feet 4 inches tall, and when asked to estimate the height of defendant, who of course was in the courtroom, he said, "Well, I would say he is five feet four." Defend-

ant relies on the fact that the record shows that his height is about 5 feet 11 inches. Muldrow, however, in referring to the heights of defendant and the robber, used the identical figures of 5 feet 4 inches, and the jury may reasonably have concluded that he was confused by figures and did not know how to estimate the height of a person in feet and inches. Although his testimony is unclear and inconsistent in some respects, he made an unequivocal identification of defendant as the robber, and his testimony was corroborated to some extent by that of Manus, who testified that defendant was about the same height as the robber, had similar features and looked like him. We cannot say as a matter of law that the evidence is insufficient to support the judgment.

The asserted misconduct of the district attorney occurred during the examination of the witness Buttrey and consisted of asking questions the purpose of which, according to defendant, was to implant in the minds of the jurors the idea that defendant's brother was the other participant in the crime. As we have seen, Buttrey testified that he saw defendant at Top's Cafe on the night the robbery was committed. On cross-examination the district attorney asked him who was with defendant at the cafe. Buttrey answered that the defendant and his brother, Jimmy, came together and that Jimmy remained at the cafe after defendant left. The district attorney also questioned the witness as follows:

"Q. When did you first hear that the Clock Cafe down on Atlantic Boulevard by Florence had been been stuck up? A. At the time that the two boys were picked up; shortly after that, when they were missing.

"Q. That was long about the latter part of April? A. That's right.

"Q. And you didn't hear about this stick up or hold up at the Clock Cafe until after you heard that the boys had been arrested. A. That's right."

No objection was made to any of the questions, and no motion was made to strike any of the answers.

[2] The prosecution was entitled to explore defendant's alibi and to question the

witness with respect to the persons who were in the cafe at the time he said defendant was there. There is nothing in the record to indicate that, when the district attorney asked the witness concerning the time he first learned of the robbery, the answer would bring before the jury the fact that defendant's brother had been arrested with him. Under the circumstances, we find no misconduct on the part of the district attorney.

[3] Defendant further contends that the action of the police in placing dark glasses on him at the time he was identified by Muldrow at the police station was in violation of his constitutional rights. In this connection it may be noted in passing that defendant made no objection to Muldrow's testimony upon the ground that his identification might be based in part upon what occurred at the police station. Defendant relies solely on *Rochin v. California*, 1952, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, in support of his contention that he was deprived of his constitutional rights. That case was extensively reviewed in *People v. Haeussler*, 41 Cal.2d 252, at page 258, 260 P.2d 8, at page 12, where this court stated: "In brief the *Rochin* case holds that brutal or shocking force exerted to acquire evidence renders void a conviction based wholly or in part upon the use of such evidence." In the present case there is no evidence whatsoever of brutality or shocking conduct. In fact, there is nothing to show that force was used when the glasses were placed upon defendant, and, for all that appears, he may have consented to what was done.

[4] The final contention of defendant is that the trial court misinterpreted its duty and erroneously denied his motion for a new trial solely because it felt bound by the jury's decision on the evidence. While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict.

People v. Knutte, 111 Cal. 453, 455, 44 P. 166; *People v. Lum Yit*, 83 Cal. 130, 133-134, 23 P. 228; *In re Estate of Bainbridge*, 169 Cal. 166, 168-170, 146 P. 427. It has been stated that a defendant is entitled to two decisions on the evidence, one by the jury and the other by the court on motion for a new trial. *People v. Sarazzawski*, 27 Cal.2d 7, 15-16, 161 P.2d 934; *People v. Cesena*, 18 Cal.App.2d 727, 729, 64 P.2d 732. This does not mean, however, that the court should disregard the verdict or that it should decide what result it would have reached if the case had been tried without a jury, but instead that it should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict. *In re Estate of Bainbridge*, 169 Cal. 166, 168-170, 146 P. 427; *Green v. Soule*, 145 Cal. 96, 103, 78 P. 337; *People v. Richard*, 101 Cal.App. 2d 631, 633-634, 225 P.2d 938; *People v. Mallicoat*, 27 Cal.App. 355, 358, 149 P. 1000.

[5] In passing upon a motion for a new trial the judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such a motion unless there is a clear showing of an abuse of discretion. In the present case it clearly appears that the trial court misconceived its duty under the foregoing authorities and, for that reason, failed to give defendant the benefit of a proper review of the evidence. In ruling on the motion the court stated that it was mindful of "the rule that the jury are the sole judges of the credibility of the witnesses. It adheres to that rule to the extent that even though the Court disbelieves what the witnesses may have said, if there is sufficient evidence upon which the jury may base their decision, even though the Court sits as a thirteenth juror, it is not in a position to upset the verdict of the jury."

The statement by the trial judge that "the Court sits as a thirteenth juror" has an unfortunate connotation; the phrase is misleading, and it does not properly describe the function of the trial judge in passing upon a motion for a new trial. As we have

seen, it is the province of the trial judge to see that the jury intelligently and justly performs its duty and, in the exercise of a proper legal discretion, to determine whether there is sufficient credible evidence to sustain the verdict.

[6] After reviewing the testimony of Muldrow, who was the only witness to identify defendant positively, the trial court said that there were inconsistencies that "were awfully hard for the Court * * * to believe." It compared his testimony with that of Manus, who had the same opportunity as Muldrow but was not able to identify defendant as the robber, and pointed out that Manus was a much better witness than Muldrow. The court then stated that "Those are the things that were given to the jury and the jury, under the instructions of the Court and under the law, [were] the sole judges of the credibility of witnesses and the determiners of the facts. If there is any evidence upon which they have the right to base their conclusion, this Court is not in a position where it could upset it." Other remarks show clearly that the trial court disbelieved much of Muldrow's testimony and entertained serious doubts as to the validity of his identification of defendant, but the court nevertheless indicated at least three times that it was bound by the contrary conclusion of the jury. It is therefore evident that the trial court failed to give defendant the benefit of its independent conclusion as to the sufficiency of credible evidence to support the verdict. See *People v. Sarazzawski*, 27 Cal.2d 7, 15-16, 161 P.2d 934; *People v. Navarro*, 74 Cal.App.2d 544, 553-555, 169 P.2d 265; *People v. Bacos*, 14 Cal.App.2d 338, 348-349, 58 P.2d 221; cf. *People v. Richard*, 101 Cal.App.2d 631, 633-634, 225 P.2d 938.

[7] The judgment and the order denying the motion for a new trial are vacated with directions to again hear and determine the motion for a new trial in accordance with the rules hereinabove stated. If the trial court determines that a new trial should be granted, defendant will be entitled to a trial on the merits, but if it is determined that the new trial should be

denied, then the trial court shall again pronounce judgment upon defendant. See Pen.Code, §§ 1168, 1191, 1193, 1200, 1202, 1207 and 1213. The time limits provided for in the sections just cited shall run from the filing of the remittitur in the superior court.

SHENK, EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion and generally in the reasoning upon which it is based. I do not, however, concur in the implication that *People v. Haeussler*, 41 Cal.2d 252, 260 P.2d 8, is distinguishable from *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, and it is my view that the same rule is applicable to the Haeussler case as was applied by the Supreme Court of the United States in the Rochin case, and the Haeussler case should have been reversed by this Court. However, for the reasons stated in the majority opinion such rule is not applicable to this case.

Since this is the first case since I have been a member of this Court in which the inept statement is made that in passing on a motion for a new trial "the Court sits as a thirteenth juror," I am constrained to call attention to the absurdity of this statement. There is not a scintilla of logic or common sense in the statement that "the Court sits as a thirteenth juror" in any judicial proceeding. In the first place the judge is not the court but is the officer who presides over the court. The court consists of not only the judge but also of the various attachés such as the clerk, bailiff, reporter, etc., and even counsel who participate in the court proceeding. 14 Am. Jur., P. 247, § 2. A thirteenth juror would have no more power than any other juror—a voice and a vote in the formation of the verdict—while the court, in passing on a motion for a new trial, has the power to overrule the entire jury, set aside its verdict and grant a new trial in whole or in part before another jury. No such power ever has been, and I dare say never will be, vested in a "thirteenth juror." There should be no doubt

whatever, that under the traditional rule, a trial court in passing on a motion for a new trial made upon the ground of the insufficiency of the evidence to support the verdict, has the power, and it is its duty to vacate and set aside the verdict and grant a new trial in every case in which it is of the opinion that a fair and just verdict has not been reached. And certainly, if the court entertains a serious doubt as to the credibility of witnesses for the prosecution whose testimony is essential to establish the guilt of the defendant, this power should be exercised and a new trial granted. From the remarks of the trial judge in the case at bar it strikes me that this is a case in which this power should have been exercised.



120 Cal.App.2d 787

PEOPLE v. LANTZ.

Cr. 4981.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1953.

Defendant jailer was convicted of assault by means of force likely to produce great bodily injury upon his prisoners. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment and denied defendant's motion for new trial and defendant appealed. The District Court of Appeal, Shinn, P. J., held that where trial court sustained objections to cross-examination of beaten prisoners as to their feelings against defendant, the court's rulings did not constitute improper limitation of cross-examination.

Judgment affirmed.

1. Witnesses ⇨372(1)

The greatest latitude should be allowed in cross-examination for the purpose of showing state of mind of a witness, his interest in case, and his bias and prejudice.

2. Witnesses ⇨270(1)

The Court should limit cross-examination of witnesses so as to confine it within reasonable bounds, and curtail digressions which serve no purpose as proof of any disputed material fact in the case.

3. Witnesses ⇨372(1)

Where jailer was charged with assaulting his prisoners, and trial court sustained objections to defense counsel's proposed cross-examination of beaten prisoners as to their feelings against jailer, and cross-examination questions which would suggest that prisoners had testified to mistreatment to enlist sympathy of court to strengthen their defense against charges arising out of a brawl, court's rulings did not constitute improper limitation of cross-examination.

4. Assault and Battery ⇨96(1)

Where jailer was charged with assaulting his prisoners, it was not error for trial court to refuse instruction based on statute authorizing punishment by fine and imprisonment in county jail not exceeding 5 years for every public officer who under color of authority assaults any person, since jailer was not acting under color of authority in beating the prisoners. Pen.Code, §§ 149, 245.

5. Assault and Battery ⇨100

Where jailer had been convicted on three counts of assaulting his prisoners, sentence to one year in county jail upon each count, two of the sentences to run consecutively and the other concurrently were not excessive.

Frederic H. Vercoe, Charles B. Robinson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Roy A. Lantz, the appellant, was convicted in a jury trial of three offenses of assault by means of force likely to produce great bodily injury. The victims were Raymond R. Marquez, Eddie Nora and Elias Rodela. Defendant's motion for new trial

was denied and he appeals from the order of denial and from the judgments. His points on appeal are that the court improperly limited the cross-examination of two of the complaining witnesses and erred in refusing to give certain instructions requested by the defendant.

The assaults took place in the Los Angeles Lincoln Heights Jail during the afternoon and evening of December 25, 1951. Defendant was on duty as jailer from 3:00 p. m. until 11:00 p. m. The three victims had been arrested at about 2:00 a. m. that morning, taken to Central Police Station, then to the City Hall, then to Lincoln Heights Receiving Hospital and to Lincoln Heights Jail. There was evidence that they had been beaten by officers at the Central Police Station. The physician who examined them before they were booked at the Lincoln Heights Jail testified that he examined them and found that each was suffering from lacerations, contusions and bruises. Each of the victims testified that he had been repeatedly beaten by defendant who visited his cell about every half hour with other officers. Rodela testified that defendant kicked him in the stomach knocking him down, struck him in the stomach with his fist, again kicked him in the stomach knocking him down, struck him over the head three or four times with a heavy solid key ring, struck him hard blows on his face with his fist, cursed him and called him a "S.O.B. cop killer." The assaults took place on about eight occasions. Defendant wrapped a wet towel around his fist and struck Rodela hard blows on his head, shoulders and back of his neck. Rodela was seriously injured, a fact which is not questioned by defendant. Eddie Nora testified that he was cursed and beaten by defendant in much the same manner as Rodela. He was struck on the head with defendant's fist wrapped in a wet towel, knocked down and beaten on the head, kidneys, stomach and back of the neck; he was beaten after being knocked down. He suffered serious injuries from which he had not recovered nine months later. Defendant struck Marquez a hard blow on the head with a big key ring. Defendant and other officers came to his cell ten or more

times during the day. Marquez was struck hard blows on the head, stomach and kidneys by each of the other officers. He was knocked down by blows on the head administered by Lantz. Marquez' shoes had been taken from him; defendant stomped on his feet. Defendant asked him if he had learned a lesson and he said he had, and defendant said to him: "Well, when you get out of here, and I doubt if you will get out alive, you better get home, get your family, and get out of the country." Marquez had bruises all over his body, his face was swollen, one eye was black, his nose had bled and his feet were swollen. He received serious injuries.

The testimony of the complaining witnesses was corroborated by that of numerous police officers who were on duty at the jail during the time the injuries were inflicted. Officer Barclay testified that defendant escorted numerous officers to the cells of the prisoners on different occasions, that he heard a loud popping noise emanating from the cells and immediately thereafter saw defendant coming out of the cells with a towel. Officer Larsen testified that he saw officers strike or push Marquez and that he heard scuffling noises in Rodela's cell. Officers Coughlin, Barsley, Beck, Jensen, Long, Bell and Ross testified to having been in the cells with defendant and having witnessed defendant beating the prisoners severely. Officer Bell testified that 15 or 20 officers visited the cells and that a majority of them struck the three prisoners in the presence of defendant. Officer Schaffer testified that he had warned defendant on the night of December 25th, and that defendant replied that what had happened was "life insurance for the rest of us," and that the victims had been medically treated before they were booked and could not be "marked any more." Defendant testified that he had been a police officer for almost a year, that during the time in question he visited the individual cells of the three victims nine or twelve times but did not strike any of them or see any other officer strike them.

The victims had been arrested following a fight outside a bar between police officers and a gang of young men who were being

investigated as to their ages and their right to be served with liquor. In the fight one officer was knocked to the ground and beaten, and another officer was beaten. There was evidence that Marquez, Rodela and Nora were participants in the scuffle, which was ended when the son of the proprietor of the bar appeared with a rifle and ordered the fighting to stop. In the cross-examination of Marquez he was asked if he had been prosecuted for a crime. He answered that he had been and on motion the answer was stricken out and an objection was sustained. Defense counsel stated that the question was asked for purposes showing bias or motive of the witness. Certain proceedings were had in chambers. The witness was asked whether he had been booked for a crime on December 25th; an objection to the question was sustained. He was asked whether when he was released from jail he knew charges were pending against him; an objection to the question was sustained. He was asked whether he and his lawyer decided it would be best for him to claim he was beaten by the officers for the purpose of using that fact in his defense and to evoke sympathy. It was conceded by the prosecution that this would be a proper question to be asked before the jury, but the question was not asked. He was asked if he had been convicted of a misdemeanor, filed an application for probation, and told the story of having been beaten for the purpose of obtaining leniency from the court; an objection to the question was sustained. He was asked if the story came out in the newspapers, and an objection was sustained. He was asked whether he had testified before the Grand Jury to the same story he had told the probation officer; an objection was sustained. He was asked whether he had not testified to the beating at the trial for the reason that he had testified to them before the Grand Jury. The district attorney had no objection to that question, but it was not asked before the jury. As to all of these questions defendant's argument was that the purpose of the questions was to show motive, interest and bias. It was stipulated that the witness had not testified before the Grand Jury that defendant Lantz

was one of the officers who had beaten him, and also that Lantz had not been a witness against Marquez or the other defendants at their trials. Defendant proposed to ask similar questions of each of the other complaining witnesses, and the court's rulings were the same. It was stipulated that each witness would answer that he knew criminal charges were pending against him. Defendant proposed to ask the witness Rodela if he had not been arrested for petty theft, for being drunk, and for several violations of the vehicle code and other misdemeanors. Objections to these questions were sustained. Defense counsel proposed to ask Rodela if as a result of several arrests he considered the latest arrests of the complaining witnesses to be improper. An objection was sustained. The foregoing questions were not asked before the jury. However, Rodela was asked: "Let us go back to December 24, 1951; you did not like policemen then did you?" to which he answered: "I didn't like them no."

[1] It is urged that these rulings unduly limited the cross-examination of the complaining witnesses. That the greatest latitude should be allowed in cross-examination for the purpose of showing the state of mind of a witness, his interest in the case, his bias and prejudice, as stated in *People v. Senegram*, 27 Cal.App. 301, 149 P. 786, and other cases cited by defendant, is an elementary principle, universally recognized. If there was a reasonable doubt whether it was at all necessary to question the several witnesses in the manner proposed in order to establish bias or prejudice against the defendant, we would resolve that doubt in defendant's favor, but we do not believe that the argumentative line of questioning proposed by the defendant, if permitted, would have been of any advantage to him, or that he suffered any disadvantage or prejudice through the rulings of the court. Substantially it was proposed to ask each of the complaining witnesses whether the beatings administered by the defendant had aroused in him any feeling of bias or prejudice against the defendant. Of course the jurors would have understood that the victims of such brutal treatment could not have failed to entertain

the strongest feelings of resentment and hatred toward the guilty officers.

[2] The court may and should limit the cross-examination of witnesses so as to confine it within reasonable bounds and curtail digressions which serve no purpose as proof of any disputed material fact in the case. The fact that the witnesses felt sorely aggrieved over their mistreatment and that their feelings might have influenced them to exaggerate could have been and no doubt was dwelt upon in the arguments to the jury. But we can see no need whatever for permitting an inquiry into the feelings of the complaining witnesses against the defendant. It was absurd to even suggest that they might be other than feelings of revulsion and contempt.

[3] The questioning also suggested that the complaining witnesses testified to their mistreatment at the hands of the officers in order to strengthen their defense against the charges arising out of the brawl and to enlist the sympathy of the court. If there had been any basis at all for even suspecting that the stories of the victims had been invented, it would have been proper to follow any lines of cross-examination which would have tended to prove that they were invented for a purpose of self interest. The testimony of the three victims was corroborated by overwhelming evidence of officers who testified that they had witnessed the shameful and inhuman treatment of the prisoners by the defendant. If the stories told by the victims were true, it was of no moment whatever whether it was a fact, or was believed by them to be a fact, that their suffering might influence the court to be more lenient with them for their own offenses. There was no improper limitation of the cross-examination of any of the witnesses.

[4] Defendant requested an instruction based upon section 149 of the Penal Code, which provides: "Every public officer who,

under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding five thousand dollars, and imprisonment in the county jail not exceeding five years." Defendant says this was an included offense for which lighter punishment could be imposed than for assault by means of force likely to produce great bodily injury, and that the court erred in refusing to give the instruction. If the instruction had been given it would have suggested that defendant may have been acting under color of authority in beating the prisoners, and it would have had a tendency to confuse the jury. Defendant was not acting nor purporting to act under color of authority. He was not performing or purporting to perform any duty as a police officer. His offense would not come within section 149 but under section 245, which defines the offense of which he was accused. The court gave an instruction on the included offense of simple assault, and defined that offense. This was sufficient. Upon the testimony of the People, and that of the defendant as well, it would have been error to give the instruction requested by defendant which had no application to the facts of the case. *People v. Eggers*, 30 Cal.2d 676, 687, 688, 185 P.2d 1.

[5] The court sentenced defendant to one year in the county jail upon each count, two of the sentences to run consecutively and the other concurrently. Defendant says that the sentences were "very drastic and unwarranted by the nature and facts of the case," and that they were more severe than the courts are accustomed to impose in similar cases. We cannot agree. We think the defendant was fortunate in escaping a term in state prison.

The judgments and order denying motion for new trial are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

120 Cal.App.2d 870

PEOPLE v. HUDSON.**Cr. 4999, 5088.**District Court of Appeal, Second District,
Division 3, California.

Oct. 28, 1953.

Defendant was convicted of armed robbery. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and defendant appealed. The defendant also appealed from the order correcting the clerk's minutes and the People moved to dismiss the appeal. The two appeals were consolidated. The District Court of Appeal, Shinn, P. J., held that entries in clerk's minutes and excerpt from reporter's transcript disclosing that clerk read information and stated defendant's plea would not be taken to mean that clerk in violation of statute read that portion of indictment charging commission of previous offenses, but it would be presumed that clerk performed his duty and read the information in the manner required by law and omitted allegations of former convictions.

Judgment affirmed, appeal from order dismissed and motion to augment denied.

1. Criminal Law ⇨1141(2)

Error will not be presumed but must be shown affirmatively.

2. Criminal Law ⇨1144(10)

Entries in clerk's minutes and excerpt from reporter's transcript disclosing that clerk read information and stated defendant's plea would not be taken to mean that clerk in violation of statute read that portion of information charging commission of previous offenses, but it would be presumed on appeal that clerk performed his duty and read the information in the manner required by law and omitted allegations of former convictions. Code Civ.Proc. § 1963 subd. 5; Pen.Code, §§ 1025, 1093.

3. Criminal Law ⇨1131(4)

Defendant's appeal from order correcting record would be dismissed on ground that denial of motion to augment

record had rendered moot any question as to correctness of order correcting record and right of defendant to appeal therefrom.

Lawrence F. Girolami, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

Charles Weaver Hudson was charged by information with the crime of armed robbery, and it was alleged that he had suffered three prior convictions of offenses that were felonies in the states where they were committed. Upon the trial, in which he represented himself, he admitted to the court, out of the hearing of the jury, commission of the prior offenses and that he had served a term of imprisonment in the state prison for such offenses. His trial was to a jury; he was found guilty of armed robbery. He appeals from the judgment.

[1,2] The sole ground of appeal from the judgment is predicated upon a statement in the clerk's minutes when the cause was called for trial, namely, "The information is read and plea is stated." Appellant cites cases in which it was held error for the clerk to read to the jury allegations of former convictions contained in the information. He assumes that in the instant case the clerk read the allegations that he had previously been convicted of three felonies. This is to assume that the information was read in a manner forbidden by section 1093 of the Penal Code. The section reads: " * * * 1. If the indictment or information be for a felony, the clerk must read it, and state the plea of the defendant to the jury, and in cases where it charges a previous conviction, and the defendant has confessed the same, the clerk in reading it shall omit therefrom all that relates to such previous conviction. In all other cases this formality may be dispensed with." Section 1025, Penal Code, contains similar language.

The reporter's transcript shows the following: "The Court: The Clerk will read the Information. The Clerk: (Reading Information) To which the defendant, ladies and gentlemen, has pleaded not guilty and is now before you for trial." There is nothing in the record before us to show that the clerk read the allegations with respect to the prior convictions, unless the entries in the clerk's minutes and the excerpt from the reporter's transcript be taken to mean that the clerk omitted nothing in reading the information.

This is as clear a case as could be found for application of the presumption stated in section 1963, subd. 15, Code of Civil Procedure, "that official duty has been regularly performed", and the rule that error will not be presumed, but must be shown affirmatively. It must be presumed that the clerk performed his duty and read the information in the manner required by law. Although this presumption is decisive of the point, we feel assured that the learned trial judge would never have permitted the trial to proceed had the clerk committed the grievous error in question.

[3] There is a second appeal in the case. After appellant's brief was filed the People suggested augmentation of the record on appeal by including a supplemental reporter's transcript and a correction of the clerk's minutes, ordered by the trial court, and an affidavit of the court reporter, showing that in reading the information the clerk omitted the allegations of the former convictions.

The defendant has appealed from the order correcting the clerk's minutes, and the People have moved to dismiss this appeal upon the ground that the order is non-appealable.

The two appeals have been ordered consolidated for disposition by a single opinion and order.

The motion to augment the record is denied.

The appeal from the order correcting the record is dismissed upon the ground that denial of the motion to augment has rendered moot any question as to the cor-

rectness of the order correcting the record and the right of defendant to appeal therefrom.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.



120 Cal.App.2d 793

PEOPLE v. KENNEDY.

Cr. 4994.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1953.

Defendant was convicted of issuing checks without sufficient funds. The Superior Court, of Los Angeles County, Kurtz Kauffman, J., entered judgment and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence warranted conviction.

Affirmed.

1. Criminal Law $\S$ 511(1)

Evidence of inculpatory participation need not be direct nor extend to every fact and detail in order to constitute sufficient corroborating evidence. Pen.Code, $\S$ 31.

2. Criminal Law $\S$ 511(2)

Circumstantial evidence is sufficient corroborating evidence even though slight, if it tends to connect defendant with commission of the crime. Pen.Code, $\S$ 31.

3. Criminal Law $\S$ 511(4)

In prosecution for issuing checks without sufficient funds, handwriting expert's testimony that in his opinion defendant wrote most of names and addresses on list of stores corroborated accomplice's testimony that part of list was written by defendant. Pen.Code, $\S$ 31.

4. False Pretenses $\S$ 49(3)

Evidence warranted conviction for issuing checks without sufficient funds.

5. Criminal Law §1023(10)

Purported appeal from sentence was dismissed.

William Herbert Hall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged in seven counts with issuing checks without sufficient funds. Trial by jury was waived. He was acquitted upon the first three counts and was convicted upon the other counts. His notice of appeal states that he appeals from the judgment and sentence. His contention is that the evidence was insufficient to support the conviction.

The following references to the evidence pertain to the last four counts.

On June 15, 1952, Fyeem A. Joseph handed a check for \$20 to the assistant manager of Crawford's Markets at said market in Alhambra. The assistant manager O.K.'d the check, and the cashier gave Joseph \$20 in exchange for the check. The assistant manager testified that, at that time, he saw defendant Kennedy "out in the car," and after the check was cashed he saw Joseph get in the car and saw defendant drive away.

About June 23, 1952, the owner of the Monte Vista Market in Montebello cashed a certain check for \$20.

On June 23, 1952, Joseph handed a check for \$20 to the cashier at the Market Basket market in Whittier, and she gave him \$20 in exchange for the check.

On June 23, 1952, Joseph handed a check for \$20 to a food clerk at the Safeway Store in Whittier, and she gave him \$20 in exchange for the check. She testified that defendant was with Joseph when the check was cashed.

Joseph testified that the pen and ink writing on the front of said checks was his handwriting; and that the defendant was

with him when he cashed the checks—with him "in the car when those checks were passed."

The four checks, above-mentioned, bore the purported signature of Fyeem A. Joseph. None of said checks was paid by the bank upon which it was drawn. Defendant did not have an account at any of those banks and did not have any arrangement for credit with any of them whereby a check drawn by him upon any of the banks would be honored.

Officer Slosson testified that he arrested defendant on July 2, 1952, at the Shelly Air Base when defendant came out to an automobile; he (officer) found two sheets of paper under the front seat of the automobile, upon which papers there was handwriting. Those papers are referred to as Exhibit H. On that exhibit there were, in handwriting, the names and addresses of 16 food markets, including the names of the markets here involved where checks were cashed.

Officer O'Brien testified that, in his presence, the defendant wrote with pen and ink on a sheet of paper referred to herein as an exemplar of defendant's handwriting.

Mr. Harris, a handwriting expert, testified that, in his opinion, the names and addresses on Exhibit H, appearing under items listed as 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16, were written by the same person who made said exemplar of handwriting; he (witness) did not identify the handwriting in the word "easy" appearing after item 3 on the list, and he did not identify the "O. K.s" that are after most of the items.

Joseph testified further that he had known defendant about three months (at time of preliminary examination in July); some of the handwriting on Exhibit H was his handwriting; and the remainder of it was done by defendant; they were together when the list was made on June 23, 1952; "It is a list of all the stores, classifying that each store that we went in or that I went in was either easy or hard to make; in other words, to make a store I would case the store and cash the check and if I had any trouble in cashing the check it would

mean the store was either easy or hard"; about three weeks before Joseph (witness) started cashing checks, he asked defendant about his (defendant's) probation and "how do you go about cashing these checks?"; he replied, "It is easy"; defendant showed him how to make out the first one. When Joseph was asked if he had any conversation with defendant prior to cashing a check on June 14th, he said that "[I]t was a question of we didn't have money to eat on, we were busted, and I was wondering where we could get some money to get by until he could get a pay check," and "so we went and started cashing checks." He testified further that he asked defendant how to make it easier for Joseph to cash the checks; Joseph altered his chauffeur's license, and in making the alteration he used ink eradicator at defendant's suggestion; Joseph gave to defendant all the one dollar bills and the change received when making a purchase and cashing the checks, and Joseph kept the five and ten dollar bills; Joseph was arrested on June 23, 1952, at a Market Basket market—he was overpowered by a civilian; at the time of his arrest he had a 1952 Buick with him, and in the glove compartment of it he had \$825.

Officer O'Brien testified further that while he, Officer Slosson and defendant were riding to Alhambra from the place of defendant's arrest, he (Officer O'Brien) asked defendant if he had seen Exhibit H (the list of markets) before, and defendant replied that he had seen it; that later in that day, at the police station, he asked defendant who wrote the list, and defendant denied having seen the list before it was shown to him when he and the officers were on the way from the place of arrest.

Defendant testified that he had known Joseph about seven months (at the time of trial in September); he made a loan of \$100 to Joseph; he (defendant) was in or outside some of the stores when Joseph cashed checks, but prior to going there he did not have any conversation with Joseph about the purpose of going to the stores; he and Joseph made the list of stores, Exhibit H, in June, 1952, at the place where defendant was living on 79th Street; the

list contains handwriting of defendant and Joseph; he (defendant) was convicted "some time ago" of issuing checks without sufficient funds, was granted probation, and ordered to make restitution of \$180; on June 26th he made restitution and also paid the fine of \$100; he denied that there was any conversation between him and Joseph regarding the cashing of checks or classifying each store as easy or hard to make; he denied that he was with Joseph or in the car when Joseph cashed the checks, but he said that on one occasion he was in the car when Joseph went into a store to get meat and bread; he (defendant) did not tell the truth when he told Officer O'Brien, at the police station, that he had not seen the list; he denied that he had seen the list, because he heard that Joseph was in jail and he thought that the list might be connected with some trouble Joseph was in; Joseph told defendant that he was collecting bills for a man he was working for and he was getting a percentage, and the list was supposed to be a list of the stores he was collecting from; the notations made on the list by him and Joseph related to whether or not he collected "this money for this fellow." On cross-examination he said that the first five items on the list were written by Joseph, and that he (defendant) wrote some of the other items; all the store names and addresses were written at one time; defendant wrote the notations, "easy," "n. g.," and "o. k." after some of the items on the list; he believed that he made notations after eight of the items; he believed that most of the checks involved here were cashed at places shown on the list; he did not have a car; Joseph had a car which defendant drove on one occasion.

[1-4] Appellant argues that the only evidence that he aided and abetted Joseph was the testimony of Joseph, an accomplice, whose testimony was not corroborated; and that mere presence at the scene of the crime or mere association with Joseph was not sufficient proof of guilt. Section 31 of the Penal Code provides: "All persons concerned in the commission of a crime * * whether they directly commit the act * *

or aid and abet in its commission, or, not being present, have advised and encouraged its commission * * * are principals in any crime so committed." In 8 California Jurisprudence, at pages 178 and 179, it is said: "Evidence to corroborate an accomplice need not * * * extend to every fact and detail covered by the statements of the accomplice, or to all the elements of the offense, or prove that the accomplice has told the truth. However, the corroborative evidence must tend in some slight degree, at least, to implicate the defendant." In *People v. Henderson*, 34 Cal.2d 340, it is said at page 343, 209 P.2d 785, at page 786: "The evidence of inculpatory participation need not be direct nor extend to every fact and detail. It may be circumstantial and is sufficient, even though slight, if it tend to connect the defendant with the commission of the crime." The testimony of Joseph was corroborated. The handwriting expert said that in his opinion appellant wrote most of the names and addresses on Exhibit H, the list of stores. Appellant admitted that he wrote some of the names and addresses thereon. Also he admitted that he wrote several of the notations thereon, such as "easy," "n. g.," and "o. k.," after some of those names and addresses. When he was arrested, as he came from his place of employment to an automobile, the said list was found under the front seat of the automobile. Soon after his arrest he said that he had seen the list previously. Later in that day, he said he had not seen the list prior to his arrest. At the trial, he admitted that he had not told the truth with regard to when he first saw the list. He also said that after he had helped make the list it was not in his possession. The checks involved here were cashed at stores which were included in that list. The assistant manager of Crawford's Markets saw appellant waiting in an automobile when Joseph cashed the check at that store and, after the check had been cashed and Joseph had gotten into the automobile, he saw appellant drive away. The clerk in the Safeway Store saw appellant with Joseph when Joseph cashed the check at that store. Appellant admitted, at the

trial, that he was at some of the stores when Joseph cashed checks. The evidence shows more than mere association with Joseph and more than mere presence at some of the places where the checks were cashed. The evidence was sufficient to support the judgment.

[5] The purported appeal from the sentence is dismissed. See *People v. Tallman*, 27 Cal.2d 209, 215, 163 P.2d 857. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



120 Cal.App.2d 612

HOLMES et al. v. MOESSER.

Clv. 19621.

District Court of Appeal, Second District,
Division 2, California.

Oct. 15, 1953.

Rehearing Denied Nov. 3, 1953.

Hearing Denied Dec. 10, 1953.

Action by husband and wife for injury resulting from fall of wife on stairs of apartment building in which they were tenants. The Superior Court of Los Angeles County, Benjamin J. Scheinman, J., directed verdict for landlord and tenants appealed. The District Court of Appeal, McComb, J., held that tenants had failed to show alleged negligence of landlord in failing to provide hand rail was the proximate cause of tenant's injury.

Affirmed.

I. Landlord and Tenant ☞ 169(6)

In order to warrant a judgment for negligence tenants must prove landlord has committed a wrongful act which is the proximate cause of tenant's injury, and it is not sufficient that evidence merely raises a conjecture, a suspicion or a speculation that landlord has committed a wrongful act.

2. Landlord and Tenant ☞169(4)

The burden of proof is upon tenants to show a causal connection between the alleged negligence of landlord and the resulting injuries of tenant.

3. Landlord and Tenant ☞169(6)

Where evidence disclosed that tenant's fall on stairway was caused by her foot slipping on stair, alleged negligence of landlord in failing to provide handrail was not established as proximate cause of injury. St.1923, p. 812, § 46.

Henry C. Rohr, Los Angeles, for appellants.

Moss, Lyon & Dunn, Gerold C. Dunn, and Henry F. Walker, Los Angeles, for respondent.

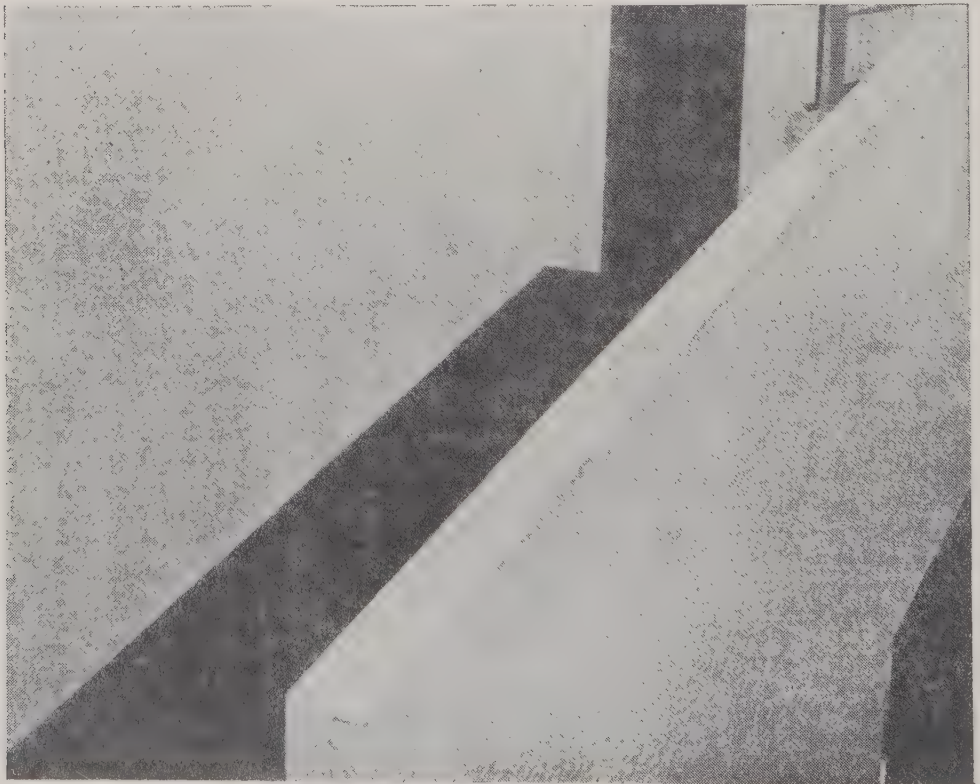
McCOMB, Justice.

From a judgment in favor of defendant, predicated upon the granting of her motion for a directed verdict in an action to recover damages for personal injuries re-

sulting from a fall on a stairway, plaintiffs appeal.

Viewing the evidence, as we must, in the light most favorable to appellants (Hunt v. United Bank & Trust Co., 210 Cal. 108, 117 [9], 291 P. 184 the facts are these:

Defendant was the owner of an apartment house in which plaintiffs (husband and wife) rented an apartment which they occupied March 1, 1951. The apartment rented by plaintiffs was located on the second floor to the right of the front stairway when ascending the stairs. The stairway had two portions with a landing at the half-way point. In ascending the stairs the first series of steps from the ground floor to the middle landing had a wall without a handrail on the right side and a wall with a wooden rail on the left side. From the landing to the second floor the steps had a wall on the left without a handrail and a wall on the right side which was 32 or 33 inches above the steps and was 5½ inches wide. The following is a photograph of the area:



Between 11 and 12 o'clock on the morning of June 7, 1951, plaintiff Estelle E. Holmes descended the stairway to get any mail that might have been delivered. With a letter in her hand she started up the stairs. She was wearing "spectator" shoes with "box" toes, in other words, a sport shoe with a cuban heel. After having ascended the first series of steps to the landing she stepped from the landing onto the first step with her right foot, raised her weight thereon and then placed her left foot on the second step. Her left foot slipped causing her to fall with resulting personal injuries.

Plaintiffs contend that defendant was negligent in having failed to comply with section 46 of the State Housing Act (Stats. 1923, Ch. 386, pp. 781, 812) which provides in part: "Every stairway hereafter constructed, in an apartment house or hotel, shall be as follows: * * * Every stairway shall have at least one handrail, and if the stairway be five feet or more in width, shall have a handrail on each side thereof."

This is the sole question necessary for us to determine:

Is there any substantial evidence which would sustain an inference that defendant's alleged negligence was the proximate cause of plaintiff Estelle Holmes' injury?*

[1] No. In order to warrant a judgment for negligence plaintiffs must prove that defendant has committed a wrongful act which is the proximate cause of plaintiff's injury. It is not sufficient that the evidence raises merely a conjecture, a suspicion or a speculation that defendant has committed a wrongful act. (Chapman v. Title Ins. & Trust Co., 68 Cal.App.2d 745, 751 [5], 158 P.2d 42.)

• For the purposes of this opinion only we assume that defendant was negligent in

[2] It is likewise settled that the burden of proof is on plaintiff to show the causal connection between the alleged negligence and the resulting injury. (McKellar v. Pendergast, 68 Cal.App.2d 485, 489 [2a], 156 P.2d 950.)

[3] Applying the foregoing rules to the facts in the present case, the uncontradicted evidence discloses that the proximate cause of plaintiff Estelle Holmes' injury was the slipping of her foot off the step which caused her to fall and be injured and not the absence of a handrail on the stairway. This being true plaintiffs have failed to sustain the burden of proof incumbent upon them to show that any negligence of defendant was the proximate cause of the injury. Therefore an essential element of their case was not proven and the trial court properly directed a verdict in favor of defendant. (Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 513 [3], 50 P.2d 801.)

Since there was a total absence of any evidence of negligence on the part of defendant other than the failure to provide a handrail assuming this failure constituted negligence, such negligence is immaterial in the instant case, for, as the Supreme Court said in Blodgett v. B. H. Dyas Co., supra, 4 Cal.2d at page 513, 50 P.2d at page 803; "The evidence shows that the lack of the handrail was neither the proximate nor any cause of plaintiff's fall. Any violation of the ordinance by the defendant would therefore be immaterial."

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.

failing to maintain a handrail on the second flight of steps.

120 Cal.App.2d 832

PEOPLE v. HICKOK.

Cr. 873.

District Court of Appeal, Fourth District,
California.

Oct. 26, 1953.

Hearing Denied Nov. 24, 1953.

Defendant was convicted of robbery and of robbery while armed with a deadly weapon. The Superior Court of Fresno County, George M. DeWolf, J., entered judgment of conviction and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained convictions and that no prejudicial error appeared.

Judgment and order affirmed.

1. Criminal Law ¶1171(1)

Where defendant was charged in one count with robbery and in another count with robbery while armed with a deadly weapon, and prior conviction of robbery in first degree was alleged, and defendant pleaded not guilty as to both counts of information but admitted prior conviction, it was not prejudicial error for District Attorney to ask defendant, for purpose of impeachment, whether he had previously been convicted of a felony. Pen. Code, § 3024 (b).

2. Robbery ¶24(1)

Evidence sustained conviction for robbery.

3. Robbery ¶24(1)

Evidence sustained conviction for robbery while armed with a deadly weapon.

Annette LaRue, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of robbery and, in a second count, with the crime of robbery while armed with a deadly weapon. A prior conviction of robbery in the first degree in the superior court of Fresno County in March,

1946, was also alleged. An attorney was appointed to act as his counsel. He pleaded not guilty as to both counts of the information, but admitted the prior conviction. After a trial a jury found him guilty of robbery on both counts, fixing the degree as second degree on the first count and as first degree on the second count. His motion for a new trial was denied and he was sentenced to prison on each count, the sentences to run consecutively. He has appealed from the judgment and from an order denying his motion for a new trial.

Annette LaRue, who was appointed by this court to represent the defendant on this appeal, has filed an able report with a complete review of the record and expressing the opinion that no valid grounds for appeal appear. *People v. Dodd*, 113 Cal.App.2d 682, 248 P.2d 965; *People v. Sutton*, 115 Cal.App.2d 751, 252 P.2d 633. In fairness to the defendant, this report sets forth and discusses the points which the defendant desired to have raised.

After reading the entire record we agree with counsel's conclusion that no reversible error appears. The two counts of the complaint relate to the robbery of a grocer in Fresno on the morning of November 9, 1951, and the robbery of a bakery employee in Fresno on the evening of the same day. The fact of the robbery was clearly established with respect to each count, and in each instance the victim positively identified the defendant as the robber. There was no evidence which could tend to raise any doubt as to either incident, other than the defendant's testimony that he did not commit either of these robberies. An unsuccessful attempt was made to establish an alibi, but on cross-examination the defendant testified that he could not remember whether or not he was in Fresno on the day in question.

[1] According to the report the appellant contends that the district attorney committed prejudicial error by asking him whether he had previously been convicted of a felony. In this connection, he contends that the court erred in accepting his plea of guilty in March, 1946, and in sentencing him at that time, because the case

had been dismissed at the preliminary hearing and he was never properly held to answer. The question complained of was asked by the district attorney for impeachment purposes. He had admitted the prior conviction, and nothing in the record indicates that the question was improper. Moreover, counsel's investigation disclosed that the appellant was held to answer at a preliminary hearing in March, 1946; that on arraignment in the superior court he was allowed to enter a plea of guilty after being questioned as to his understanding of the gravity of his plea, and after stating to the court that he did understand; and that he was ably represented by counsel of his own choosing at the preliminary examination and in the superior court. Appellant next contends that Section 3024 of the Penal Code was not enacted until after the commission of the crimes of which he was convicted and was therefore *ex post facto* as applied to him. Subdivision (b) of that section, which affects the appellant, was in effect at all times material here. It is next contended that one witness was biased against the appellant. Not only is this unsupported by any facts appearing in the record, but no such question was raised at the trial.

[2,3] The only other contention is that the verdict is not supported by the evidence because in several instances a discrepancy appears between the testimony of a witness at the preliminary examination and the same witness at the time of the trial, and because the transcript of the preliminary examination discloses that an officer attempted to influence witnesses in the matter of identification by placing a picture of the appellant among other pictures. The claimed discrepancies in the evidence relate to the color of wearing apparel worn by the appellant, and like matters. Any such discrepancies were natural since the trial occurred 14 months after the time of the robberies, any conflict was for the jury, and the evidence amply supports the verdict. A reading of the record discloses the evidence of appellant's guilt was overwhelming; that the identification of him was positive; and that any alleged inconsistency or weakness in the evidence was solely a

matter for the jury, and for the trial court on the motion for a new trial. No error or prejudice appears, and there is nothing in the record which would tend to indicate that the appellant did not receive a full and fair trial.

The judgment and order are affirmed.

GRIFFIN, J., concurs.



120 Cal.App.2d 863

DENBO v. SENNESS.

Civ. 19676.

District Court of Appeal, Second District,
Division 3, California.

Oct. 28, 1953.

Action by optionee for specific performance of alleged contract for purchase of land. The Superior Court, Los Angeles County, Harold W. Schweitzer, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that the option for purchase of land described as two acres of tip of designated lot in certain tract of given city facing on two named streets sufficiently identified the land as being the two acres at the point or apex of the triangle between the two streets, in view of fact that location and dimensions of lot were made certain by number of tract which was, in effect, a reference to a recorded subdivision map.

Affirmed.

1. Specific Performance ⇐121(10)

In action by optionee for specific performance of alleged contract whereby defendant promised to sell land, evidence supported finding that option had not been terminated by mutual consent.

2. Deeds ⇐38(1)

Generally, a deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to

be conveyed with reasonable certainty, either by the calls of the instrument as applied to the land or by the descriptive features of the grant. Business and Professions Code, §§ 11500-11628.

3. Vendor and Purchaser ⇨18(1)

Option for purchase of land described as two acres of tip of designated lot in certain tract of given city facing on two named streets sufficiently identified the land as being the two acres at the point or apex of the triangle between the two streets, in view of fact that location and dimensions of lot were made certain by number of tract which was, in effect, a reference to a recorded subdivision map. Business and Professions Code, §§ 11500-11628.

4. Appeal and Error ⇨934(2)

It was the duty of District Court of Appeal to reconcile conflicting findings of lower court, if possible, and to give them a meaning which would be consistent with the judgment.

5. Vendor and Purchaser ⇨18(1)

Where consideration for option to purchase land, in addition to cash, was the obtaining by optionee of agreement under which optionor would have right to buy certain land from third party, any profits made or losses sustained by optionor in resales of the property were not to be considered in determining questions of adequacy of consideration for the option and fairness of the option, which questions were to be judged under conditions which prevailed at time option was given.

6. Specific Performance ⇨121(3)

In action by optionee for specific performance of agreement to sell land, finding that option was given pursuant to oral agreement that it would be given in consideration of optionee's services in negotiating

agreement with third party whereby optionor would be enabled to buy other land was supported by evidence.

7. Vendor and Purchaser ⇨18(1)

Where land to which option to purchase related had cost optionor only \$6,000, payment of \$3,000 and optionee's services resulting in agreement whereby optionor had right to purchase 406 acres of other land at price of \$525,000 were adequate consideration and the option agreement was just and reasonable.

8. Trial ⇨395(5)

Findings should be confined to those issues required to support conclusions and judgment, and multiplicity of findings upon evidentiary matters and matters wholly irrelevant to ultimate issues imperils the judgment.

9. Trial ⇨395(5)

Findings should dispose of the ultimate, material issues only, and any other findings are surplusage.

O'Connor & O'Connor, Los Angeles, for appellant.

Vaughan, Brandlin & Wehrle, J. J. Brandlin and Thomas G. Baggot, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is an action in which plaintiff was awarded a decree of specific performance of a contract for the purchase of land from defendant. The subject of the agreement was two acres in the town of Torrance and the purchase price \$3,000. The agreement¹ consisted of a written option of defendant, accepted by plaintiff. Defendant appeals.

Under the pleadings the issues for decision were the following: (1) Was the op-

1. "Know All Men By These Presents:

"That for and in consideration of the sum of Ten Dollars (\$10.00) to me in hand paid by George S. Denbo, I covenant and agree:

"That I, the undersigned K. Sande Senness, of Los Angeles, hereby give and grant to George S. Denbo, of Los Angeles, California, his heirs and assigns (hereinafter called 'Optionee'), the exclusive right or privilege of purchasing

the following-described property upon the terms hereinafter set forth:

"2 acres of that tip of Lot 1, Tr. 9765, City of Torrance, facing on Pacific Coast Highway and Newton St.

"The terms and conditions upon which the said Optionee may purchase the said property are as follows:

"(1) The said right or privilege is conditional upon consummation by me or my nominee of the purchase of said property

tion agreement terminated by mutual consent; (2) was the two-acre parcel described with sufficient certainty; (3) was the consideration for the agreement sought to be enforced adequate, and was the agreement just and reasonable.

[1] It was found that the option was not terminated. There was evidence that defendant attempted to cancel it and that plaintiff did not agree to its termination. The finding has support in the evidence. It is not questioned that plaintiff exercised the option, tendered the purchase price and that defendants refused to give a deed.

As to the description of the two acres the court found that the parties intended, and their writing purported to describe, the two acres closest to the tip of Lot 1, Tract 9765, in the City of Torrance, bounded on one side by the northeasterly boundary of Newton Street, on the second side by the southwesterly boundary of Pacific Coast Highway and on the third side by a straight line drawn between points on said boundary lines equidistant from the intersection of Newton Street and Pacific Coast Highway and located so as to enclose exactly two acres of land. No point is made of the fact that the agreement did not state the county and state in which the City of Torrance is located. Defendant says the de-

scription of the two acres was insufficient to identify a specific parcel; that the tip of Lot 1 which faces on the two streets contains six acres, and the description given might relate to any two of the six acres. We cannot agree.

[2, 3] The general rule is that a deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed with reasonable certainty, either by the calls of the instrument as applied to the land or by the descriptive features of the grant. 9 Cal. Jur., p. 292; *Blume v. MacGregor*, 64 Cal. App.2d 244, 148 P.2d 656. Subdivision maps must be placed of record in the office of the County Recorder. Business and Professions Code, §§ 11500-11628. The location and dimensions of Lot 1 were made certain by the number of the tract which was, in effect, a reference to a recorded map. Since it is not questioned that Torrance is a town in Los Angeles County, and the map would show the location of the mentioned streets, the land could be readily located on the ground. A tip is defined in the dictionaries as "the pointed end of anything; an end; also apex; summit; an end piece or part." Two acres of the tip of Lot 1, as described, would have to take in the point or apex of the triangle between the

on or before twenty (20) years from and after the date hereof. Unless such purchase is consummated within said time, the right and privilege hereby conferred shall thereupon expire.

"(2) The said right or privilege shall be exercised by delivery to me or my nominee of a written notice of election so to do within thirty (30) days following written notice given by me to the said Optionee of the fact that I have consummated the purchase of the said property. I hereby covenant to give or cause to be given immediately such notice if and when I or my nominee consummate the purchase of said property.

"(3) The purchase price to be paid by the holder of said right or privilege shall be Three Thousand Dollars (\$3,000.00) payable in cash at the time of delivery to the Optionee of the grant deed provided for in paragraph (4) below.

"(4) Title to said property will be conveyed by me or my nominee by grant deed in the same condition in which I or my nominee may acquire it. I or my nom-

inee will furnish policy of title insurance insuring title to said property in the said Optionee or such other grantee as he shall designate.

"(5) It is possible that I may elect to nominate some person other than myself to consummate the purchase of the above-described property. If so, the right and privilege hereby granted shall nevertheless inure to the said Optionee and I shall cause my nominee to fulfill the obligations hereof.

"(6) Any notice required or permitted hereunder shall be effective when directed to me at P. O. Box 1951, Hollywood 28, Calif., or to Optionee at 27111 Buckskin Lane, Rolling Hills, California, as the case may be, and deposited postage prepaid and registered in the United States mail. Either party may by notice given as aforesaid change his address for future notices hereunder.

"In Witness Whereof, I have executed this agreement this 31st day of December, 1947.

"K. Sande Senness"

two streets. No other two acres would fit the description.

The complaint alleged that the agreed consideration for the option was the services of plaintiff in obtaining an agreement under which defendant would have the right to buy 406 acres of the Weston ranch from Weston Investment Company, and that the services were fully performed. In the answer it was alleged that as consideration for the option plaintiff agreed that he would not only arrange for defendant to purchase the 406 acres but would also induce the seller to furnish financing for the development of the land, that he did not get an agreement from the company to furnish financing for development and defendant was unable to acquire the land. It was found, on sufficient evidence, that plaintiff undertook to obtain an agreement of sale from the Weston Company but did not agree to induce the company to furnish any financing.

Such difficulty as we have on the appeal arises from the findings that the agreement was just and reasonable and the consideration adequate. Although defendant did not purchase 406 acres it is conceded that plaintiff was instrumental in negotiating an agreement with Weston under which defendant had a right to purchase 406 acres for \$525,000. Defendant paid down \$25,000 but did not complete the purchase and forfeited the \$25,000. Later, in a separate transaction he purchased some 200 acres, subdivided and improved the land and made numerous resales.

The case was tried and is briefed here upon the theory that in order to prove adequacy of consideration it was necessary for plaintiff to prove that his services constituted a consideration for the option.

The two acres cost defendant \$6,000; the option price was \$3,000. It is apparent that if the consideration for the option was the rendition of services fully performed by plaintiff, it was an adequate consideration, and the option price was fair and reasonable. It is here the difficulty arises.

[4] The court found that the consideration was adequate and the agreement just and reasonable. This was sufficient; but the findings as to consideration did not end

here. The court made 26 separate findings. They are redundant, confused and contradictory. Many of them relate to evidentiary and immaterial matters. It was found: "It is not true that the defendant agreed to give the plaintiff the option to purchase the two-acre 'triangular tip' for \$3,000 in exchange for plaintiff's services." Other findings were to the contrary. It was found that defendant orally agreed to give plaintiff the option if he would negotiate an agreement under which defendant would have the right to purchase the property for \$525,000; that the option was given pursuant to this agreement; and also that from November 27, 1947 to February 2, 1948, plaintiff devoted substantially all of his time to negotiations for the purchase of the property by defendant. It was found that defendant purchased the two acres at a cost of \$6,000 "and the services of plaintiff and benefits received by defendant exceeded the \$3,000 difference between the option price provided in the option agreement and the defendant's cost of said land and that defendant has received an adequate consideration for the agreement and that it is just and reasonable." (Emphasis added.) There were other findings to the effect that "by reason of the efforts of plaintiff" defendant later acquired about 200 acres of the Weston ranch including the two acre parcel, and that defendant constructed and sold thereon over 400 houses and made a profit of more than \$200,000. There was also a finding to the effect that although the \$10 stated consideration was not paid for the option defendant received other consideration contributed by plaintiff "in return for the described option agreement." It was thus found that plaintiff's services in obtaining the first agreement from Weston constituted the consideration for the option and also that they did not constitute the consideration. In such a situation it is our duty to reconcile the conflicting findings, if possible, and give to them a meaning which will be consistent with the judgment. *Coyne v. Nelson*, 107 Cal.App.2d 469, 237 P.2d 45; *Richter v. Walker*, 36 Cal.2d 634, 226 P.2d 593.

[5] Defendant says the finding there was adequate consideration for the option was based upon the findings that plaintiff

negotiated the second agreement and that defendant profited largely through sales of lots in the subdivision.² He contends it was proved, without contradiction, that plaintiff had nothing to do with that transaction. In this he is supported by the record. Furthermore, any profits made or losses sustained by defendant in resales in the subdivision were not to be considered in determining the questions of adequacy of consideration and fairness, which were to be judged under the conditions which prevailed at the time the option was given. *Drullinger v. Erskine*, 71 Cal.App.2d 492, 163 P.2d 48.

[6,7] If the findings of adequacy of consideration and the fairness of the agreement were based upon the unsupported finding that plaintiff negotiated the second agreement, or upon the finding as to defendant's profits on resales, they were in error. However, it cannot be said with any degree of certainty that the findings of adequacy of consideration and fairness were based upon the findings that plaintiff's services were responsible for the second agreement and that defendant made profits on resales. The finding that the option was given pursuant to an oral agreement that it would be given in consideration of plaintiff's services in negotiating the first agreement is supported by the evidence and is consistent with the judgment. The finding that the option was not given in consideration for plaintiff's services was not only inconsistent with the other findings but also with the admissions of the answer and, in our opinion, was an inadvertence on the part of the trial court. While the inconsistency and contradictions are obvious, consideration of the findings as a whole, in the light of the record, inclines us to give effect to the finding that the true consideration, as understood by the parties, was plaintiff's services in negotiating the agreement for the purchase of the 406 acres. This finding justified the further findings

that the consideration was adequate and the agreement just and reasonable.

[8] The problem just discussed on the appeal arose from the fact that instead of three findings the court made 26, of which 23 were not only unnecessary but contradictory and confusing in many respects. We have had occasion before to remark that the preparation of findings is a matter which calls for the careful selection of the issues upon which findings are required as support for the conclusions and judgment, that the findings should be confined to those issues, and that a multiplicity of findings upon evidentiary matters and matters wholly irrelevant to the ultimate issues frequently creates serious problems for a reviewing court and imperils the judgment. *Swanson v. Wheeler*, 112 Cal.App.2d 43, 245 P.2d 699; *Eggeman v. Binford*, 106 Cal.App.2d 556, 235 P.2d 409; *Robbins v. Holther*, 98 Cal.App.2d 674, 220 P.2d 585; *Crummer v. Besser Mfg. Co.*, 100 Cal.App.2d 189, 223 P.2d 100; *Alles v. Hipp*, 108 Cal.App.2d 730, 239 P.2d 451; *Sanal v. Meador*, 108 Cal.App.2d 820, 239 P.2d 908. This is such a case.

[9] Findings deserve greater attention than they receive. There seems to be a common misunderstanding that every allegation and denial of every pleading, however immaterial, and whether admitted or denied, necessitates a special finding. It is elementary that findings should dispose of the ultimate, material issues and that all else is surplusage, but the practitioners who understand this are a small minority. The busy trial judge must depend on counsel to propose findings, and should be able to sign them with confidence that they are in accord with his directions. But his confidence is frequently misplaced. On this appeal the court has had a problem thrust upon it for which there is no excuse.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

2. It is clear from the complaint and the brief of plaintiff's attorneys that they entertain the theory that the contract was just and reasonable because defendant

made a profit in resales. The record does not show that the court shared that view of the law.

120 Cal.App.2d 783

PIAZZA et al. v. HEIDLEBAUGH.

Civ. 19647.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1953.

Hearing Denied Dec. 17, 1953.

Action by a husband and wife for personal injuries to plaintiff wife as the result of collision between an automobile driven by her and a truck driven by defendant. From a judgment of the Superior Court of Los Angeles County, Robert H. Scott, J., on a verdict for defendant, plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that the evidence was sufficient to support the judgment.

Judgment affirmed.

1. Appeal and Error ⇨930(1)

In reviewing evidence on appeal, all conflicts must be resolved in respondent's favor.

2. Appeal and Error ⇨989

When verdict is attacked as unsupported by evidence, appellate court's power begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support jury's conclusion.

3. Appeal and Error ⇨996

When two or more inferences can be reasonably deduced from facts in evidence, reviewing court is without power to substitute its deductions for those of trial court.

4. Automobiles ⇨244(10)

In action for injuries sustained in collision between automobile driven by plaintiff and approaching truck driven by defendant on city street, evidence was sufficient to support judgment for defendant.

Anthony Piazza and Clara Elizabeth Piazza, in propria persona.

Wayne Veatch and Henry R. Thomas, Los Angeles, for respondent.

PARKER WOOD, Justice.

In this action for damages resulting from a collision of an automobile and a truck,

the verdict and judgment were for defendant. Plaintiffs' motion for a new trial was denied, and they appeal from the judgment. Their principal contention is insufficiency of the evidence to support the judgment.

Plaintiffs are husband and wife. The collision occurred on May 18, 1951, about 3 p. m., in Los Angeles on Vanowen Street west of the intersection of that street and Balboa Street. Plaintiff Mrs. Piazza was driving a Plymouth automobile in a westerly direction on Vanowen Street, and defendant was driving a truck easterly on that street. Vanowen Street north of the double line (the paved portion) is 30 feet wide, and the paved portion south of that line is 12 feet wide, and the dirt shoulder on the south side is 8 feet wide.

Mrs. Piazza testified that she was driving a Plymouth automobile, which had no front fenders, in a westerly direction on Vanowen Street; when she went through the intersection of Balboa and Vanowen Streets the signal was green (for the direction in which she was going); she was driving between 20 and 25 miles per hour, and her automobile was about 2 feet to the right (north) of the white line; after crossing the intersection, an automobile which had been in front of her in the same lane she was in veered to the right; there was no automobile in front of her thereafter; she was not attempting to pass an automobile; after she went through the intersection she noticed that several automobiles—quite a few automobiles—eastbound on Vanowen Street were stopped south of the double line (presumably waiting for the next green signal); the point of the accident was half the length of her automobile beyond the last of those parked automobiles; the truck (driven by defendant) came from a southerly direction and crashed into the left front door of her automobile; the "truck came in at the back of the last parked car"; she did not see the truck, except for an instant before the collision; she suffered personal injuries.

Defendant testified that he was driving a dump truck, which weighed about 7,800 pounds, in the eastbound traffic lane on Vanowen; there was only one paved east-

bound traffic lane; he was driving about 30 miles per hour; the day was clear; he noticed the Plymouth automobile (plaintiffs' automobile) "come around to the left of another car over the white line"; he immediately applied the brakes and tried to stop; when he applied the brakes, the nearest eastbound automobile (in the eastbound lane) was 3 or 4 car lengths ahead of him, and the left side of his truck was about 2 feet from the center white line; the Plymouth came over the white line about 2 or 3 feet; the plaintiff tried to swerve away from him—she was trying to turn back into her lane; the left front wheel of the Plymouth came in contact with the left front wheel of the truck; as she swerved away from him she caught the front wheel of the truck and pulled the truck over toward the center of the street; at the time of the impact he was almost stopped—maybe he was going 5 or 10 miles an hour; she was driving 25 or 30 miles per hour; his truck left skid marks 33 feet in length; after the accident the left front wheel of his truck "was over the white line just a little bit."

Mr. Deeble, a witness called by defendant, testified that he observed the accident; prior to the accident he was driving in the eastbound paved lane of Vanowen Street following defendant's truck; he was trailing the truck at approximately the rate of 30 miles per hour; suddenly a Plymouth automobile, without front fenders, "whipped out from behind a car coming westbound"; at that time the truck was about 1½ to 2 feet to the right (south) of the center line.

[1-4] There was a substantial conflict in the evidence with respect to the question of negligence. "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent * *. [W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute

its deductions for those of the trial court." *Crawford v. Southern Pacific Co.*, 3 Cal.2d 427, 429, 45 P.2d 183, 184. The testimony on behalf of defendant was not inherently improbable. The evidence was legally sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



120 Cal.App.2d 858

JONES v. CITY OF LOS ANGELES et al.

Civ. 19516.

District Court of Appeal, Second District,
Division 2, California.

Oct. 28, 1953.

As Corrected on Denial of Rehearing

Nov. 24, 1953.

Hearing Denied Dec. 23, 1953.

Mandamus proceeding to compel reinstatement of discharged city employee. The Superior Court of Los Angeles, Frank G. Swain, J., sustained demurrer to amended petition without leave to amend and rendered judgment of dismissal and the employee appealed. The District Court of Appeal, Fox, J., held that where more than four years elapsed from the time the discharged city employee served his original petition until he filed his first amended petition, and employee did not plead facts explaining or excusing his lack of diligence, his claim for reinstatement was barred by laches.

Affirmed.

1. Mandamus ⇐ 143(2)

Where more than four years elapsed from time discharged city employee served his original petition until he filed his first amended petition in his mandamus proceeding for reinstatement, and employee did not plead facts explaining or excusing his lack of diligence, his claim for reinstatement was barred by laches.

2. Action ⇐ 63

The mere institution of a suit does not of itself relieve from the charge of laches,

and if there is failure of diligent prosecution of the suit the consequences are the same as though no action had been begun.

3. Action ⇨63

Laches involves more than the element of delay, and it is not so much the lapse of time as it is the prejudicial consequences of the delay that justifies the application of the doctrine.

4. Officers ⇨76

An employee of a public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights, and if he does not, prejudice from his delay will be presumed.

5. Officers ⇨76

Where long delay in taking necessary steps in prosecution of action for reinstatement to public position appears from record, it is incumbent on the holder of such position, if he would avoid the effect thereof, to plead facts which explain or excuse his apparent lack of diligence.

6. Mandamus ⇨143(2)

Discharged city employee's explanation of the long delay of some four years in prosecution of his mandamus proceeding for reinstatement, that he and his attorneys were diligently working on and preparing the amended petition and gathering necessary data therefor was merely a conclusion and was wholly insufficient to explain or excuse the long delay in absence of any factual support.

7. Mandamus ⇨143(2)

The failure of discharged city employee to carry out his duty to prosecute his mandamus proceeding for reinstatement with diligence and to excuse or explain the long delay of some four years was not justified on ground that city did not avail itself of remedies which might have brought the matter to an earlier conclusion. Code Civ.Proc. § 583.

Deputy City Atty., Los Angeles, for respondents.

FOX, Justice.

[1] Petitioner was discharged on January 6, 1947, from the position of principal electrical inspector of the city of Los Angeles. His discharge was sustained by the Board of Civil Service Commissioners in the following May, and his demand for reinstatement was denied by the commission on June 26, 1947. His original petition for a writ of mandamus to compel his reinstatement was served on the president of the city council on November 26, 1947, and filed December 4 but was not presented to the court until October 7, 1948. He then obtained an alternative writ of mandate, returnable October 27th. The hearing on the alternative writ was continued from time to time until January 19, 1949, at which time respondents' demurrer was sustained, with 20 days to amend. No further action was taken until March 13, 1952, when an amended petition was filed by present counsel, who had just entered the case. During the intervening period no stipulation extending petitioner's time to amend was filed and no order extending such time was made. Respondents' demurrer to the amended petition was sustained without leave to amend. Petitioner appeals from the ensuing judgment of dismissal.

The only question requiring decision is whether petitioner's claim for reinstatement is barred by laches. The answer is clearly in the affirmative.

It will be noted that more than ten months went by after petitioner served his petition on the president of the city council before he presented it to the court, and that more than 15 months elapsed from the time petitioner's demand for reinstatement was denied by the Civil Service Commission before he filed his petition in the superior court. It was, however, more than three years after the respondents' demurrer to his original petition was sustained before he presented his amended petition. Thus it was in excess of four years from the time petitioner served his original petition until he filed his first amended petition.

[2,3] The lapse of such a period of time shows that petitioner was not diligently prosecuting his claim for reinstatement

Kenny & Morris, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Alan G. Campbell, Asst. City Atty., George William Adams,

in this important public position and therefore his amended petition was vulnerable to respondents' demurrer on the ground of laches. In *Wells Fargo Nevada Nat. Bank v. Barnette*, 9 Cir., 298 F. 689, 691, 43 A. L.R. 916, the court stated: "It is well settled that the mere institution of a suit does not of itself relieve from the charge of laches, and if there is failure of diligent prosecution of the suit the consequences are the same as though no action had been begun." In *Willard v. Wood*, 164 U.S. 502, 525, 17 S.Ct. 176, 181, 41 L.Ed. 531, the court pointed out that "The mere fact that the bill was left on the files would not, in itself, relieve from the effects of laches; for failure in diligent prosecution may have the same consequences as if no suit has been instituted." It is, of course, true that laches involves more than the element of delay. It is not so much the lapse of time as it is the prejudicial consequences of the delay that justifies the application of the doctrine. *Hayman v. City of Los Angeles*, 17 Cal.App.2d 674, 680, 62 P.2d 1047.

[4] Considerations of public policy require that an employee of a public body who claims to have been improperly or illegally discharged must act with utmost diligence in asserting his rights. If he does not, prejudice from his delay will be presumed. In the *Hayman* case, where there was a delay of nine months in filing suit, during which time plaintiff had attempted to obtain reinstatement to his position by negotiation, the court stated, 17 Cal.App.2d at page 680, 62 P.2d at page 1050: "It is to be presumed that, where one has been discharged from an active position in the public service, some one else has been chosen to take his place. The work has to be done and it has to be paid for." See, also, to the same effect, *Pacheco v. Clark*, 44 Cal.App.2d 147, 151, 112 P.2d 67, and *Newbury v. Civil Service Commission*, 42 Cal.App.2d 258, 261, 108 P.2d 745.

[5,6] Where long delay in taking necessary steps in the prosecution of an action for reinstatement to a public position appears from the record, it is incumbent on the petitioner, if he would avoid the effect thereof, to plead *facts* which explain or

excuse his apparent lack of diligence. *Hayman v. City of Los Angeles*, supra. In *Campbell v. City of Los Angeles*, 47 Cal. App.2d 310, 315, 117 P.2d 901, 904, it is said: "Unless facts be alleged which constitute a sound excuse for a delay of fifteen months, such delay in commencing the action is absolutely indefensible. One must proceed with diligence who would compel his reinstatement to a civil service position from which he has been discharged. [Citation.] A delay of fifteen months after his discharge is so long as to deprive petitioner of all rights to equitable consideration. [Citations.]" Incidentally, it should be noted that a demurrer was sustained without leave to amend in the *Campbell* case as in the instant proceeding. The only explanation that petitioner gives for the long delays in the prosecution of this suit is that he and his attorneys have been "diligently" working on and preparing this petition and gathering necessary data therefor ever since September 20, 1947. This allegation is merely a conclusion and wholly insufficient to explain or excuse petitioner's long delays for it is completely devoid of any factual support.

[7] Petitioner suggests that the city could have had judgment entered after the expiration of 20 days following the sustaining of the demurrer on January 19, 1949, to his original petition, and that the city also had its remedy by motion to dismiss under section 583, Code of Civil Procedure, but it did not pursue either of these remedies. He then seems to argue that the city's failure to act excuses his delays. But this is not true. There was no duty on the part of the city to act, but there was a duty on the part of petitioner to prosecute his suit for reinstatement with diligence and to excuse or explain his delays. This he has failed to do. He cannot justify such failure on the ground that the city did not avail itself of remedies which might have brought this matter to an earlier conclusion.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

120 Cal.App.2d 666

ARCHIBALD v. IACOPI et al.

Civ. 15539.

District Court of Appeal, First District,
Division 2, California.

Oct. 19, 1953.

Rehearing Denied Nov. 18, 1953.

Action against lessees by furnisher of materials and labor necessary for surfacing of leasehold in real estate for unpaid balance on contract. The Superior Court, County of San Mateo, Strother P. Walton, J., rendered judgment for unpaid balance and foreclosed lien on leasehold interest and lessees appealed. The District Court of Appeal, Nourse, P. J., held that interest on extras in work and materials which were not covered by contract and the value of which was not fixed until date of judgment should run from date of judgment.

Judgment reversed in part with directions and affirmed in part.

1. Contracts ⇨322(4)

In action against lessees by furnisher of materials and labor necessary for surfacing of leasehold in real property for unpaid balance under contract, evidence supported finding that work was done in a satisfactory manner in accordance with contract.

2. Interest ⇨36(1)

Where contract for surfacing of leasehold in real property called for payment of one third of \$5500 when red rock was slurred, one-third on completion of contract, and the other third by a promissory note payable in twelve months at 5 per cent interest, allowance of 7 per cent interest on the third payable in twelve months was error.

3. Interest ⇨39(3)

Interest on extras in work and materials which were not covered by contract and the value of which was not fixed until date of judgment should run from date of judgment.

4. Abatement and Revival ⇨20

Appeal and Error ⇨173(10)

Defense that an action is premature is a dilatory plea, not favored in law, and

is considered waived, if it is not specifically pleaded and urged in trial court.

5. Abatement and Revival ⇨20

Where action was premature at time it was brought, but cause of action had matured at time of trial, plea of abatement was properly dismissed.

6. Mechanics' Liens ⇨191

Where materials and labor were furnished for surfacing of leasehold in real property, mechanic's lien attached to leasehold for value of labor and materials. Code Civ.Proc. §§ 1181, 1183.1, 1184.1.

Alan A. Dougherty, San Francisco, for appellants.

Aaronson & Cohn, San Carlos, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to recover the unpaid balance on a written contract, supplemented by several oral agreements, to furnish rock, oil, screening and labor necessary for the surfacing of the leasehold of defendants Daniel, husband and wife, in real property to be used for an auto court. He also sought a foreclosure of a mechanic's lien. In a trial to the court plaintiff had judgment for the balance found due, and also had a foreclosure of the lien on the leasehold interest. The action was dismissed as to the defendants Iacopi, the owners of the fee. They are not parties to the appeal.

The appellant (we refer herein to the husband as appellant) urges three grounds for a reversal. (1) The insufficiency of the evidence to support the finding that the work was done in a satisfactory manner in accordance with the contract. (2) The alleged error in the allowance of interest. (3) The foreclosure of the lien on the leasehold.

[1] On the question of the evidence of completion of the contract the usual discrepancies appear. For the respondent testimony was offered tending to show that the work was performed according to the specifications, but that, immediately follow-

ing completion, a heavy rain fell and on the following day several low spots and puddles were seen on the pavement ranging from a quarter of an inch to two inches in depth. Respondent's evidence was that in this type of construction covering a large area (35,000 square feet) a reasonable tolerance for such "dents" was plus or minus one-half inch. It was also shown that the soil of the area was adobe which was a particularly hazardous type of soil to build on.

On the part of the appellant, evidence was given emphasizing these depressions in the surface of the pavement particularly following a heavy rain. A witness from the county engineer's office expressed the opinion that the surfacing had not been done properly or that improper material had been used. He conceded, however, that he knew nothing about the plans and specifications of the contract and could not say whether they had been complied with. Appellant, however, testified that such plans and specifications as had been agreed upon were followed in the construction. The contention is that the work was improperly done. He conceded, however that he was on the job daily and frequently instructed respondent's employees as to how they should do the work. It is also significant that at the time of the trial appellant had been operating the auto court on the premises and no evidence was given of loss of trade or of income because of defects complained of.

On this conflicting evidence it was clearly a question for the trial court to determine whether respondent had performed the services in accordance with the written and oral contract. The findings favorable to respondent are controlling.

[2-3] (2) The question of interest. The plaintiff sued on a written contract for \$6,994.63. The trial court found in accordance with the facts that the contract called for payment of \$5,500. Extras in work and materials were found to be of the value of \$673.03. The contract called for a payment of one-third when red rock was slurried, one-third on completion of the contract, and one-third by a promissory note payable in twelve months at 5% in-

terest. Defendant paid \$2,650, leaving a balance of \$2,850. One-third of the contract price was \$1833.33. Since plaintiff agreed to forego payment of that sum at interest of 5% the allowance of 7% interest on that sum was error. The extras were not covered by contract. Their value was not fixed until the date of the judgment. Interest thereon should run from that date. *Hansen v. Covell*, 218 Cal. 622, 631, 632, 24 P.2d 772, 89 A.L.R. 670. The work was completed on December 2, 1949. The judgment should therefore have provided for interest from that date on \$1,833.33 at the rate of 5% and on \$1,016.67 (\$2850 minus \$1833.33) at the rate of 7%, and moreover of interest on \$673.03 at the rate of 7% from December 13, 1951, the date of the judgment.

[4, 5] Appellant's contention that with respect to the one-third payable by a promissory note twelve months after completion of the work the action was prematurely instituted on March 17, 1950, cannot be sustained. The record does not show the date on which the original complaint was filed. The defense that an action is premature is a dilatory plea not favored in law, and it is considered waived if, as is the case here, it is not specially pleaded and urged in the trial court. *Kelley v. Upshaw*, 39 Cal.2d 179, 246 P.2d 23. Moreover at the time of the trial (November, 1951) the stated ground of abatement did not exist anymore and then it may be disregarded. 1 Cal.Jur.2d 32.

[6] (3) The foreclosure of the lien on the leasehold. Appellant's contention that no such lien attached or could be foreclosed is without merit.

On December 20, 1949, when the claim of lien in this matter was filed section 1185 of the Code of Civil Procedure contained the provision that if the person who caused the improvement to be constructed owned less than a fee simple estate in the lease on which the construction took place, "then only his interest therein is subject to such lien, except as provided in section 1192 of this code." (A similar provision is now contained in Section 1183.1 of said code.)

Said provision was applied to a leasehold interest in *Peterson v. Freiermuth*, 17 Cal. App. 609, at page 620, 121 P. 299, at page 303, where it is said: "Under the provisions of section 1185 of the Code, where the lessor of property, upon which the lessee has constructed improvements, has given the notice required by section 1192 of said Code, the leasehold interest of the lessee is subject to the lien for the value of the labor and materials, provided, of course, that the contract for the construction of the building has been reduced to writing and recorded as required * * *." In *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 279, 22 P. 231, it was held that when the lessor has not given said notice both the estate of the owner of the fee and the estate of the owner of the leasehold interest are subject to the lien. That a mechanic's lien may attach to, and be enforced against, a leasehold interest for labor and materials furnished under a contract with the lessee is generally accepted also in other jurisdictions, 57 C.J.S., *Mechanics' Liens*, §§ 17, 65, pages 512, 558. In this state a leasehold interest is subject to levy and sale, 15 Cal. Jur. 1017, § 26. *English v. Olympic Auditorium, Inc.*, 217 Cal. 631, 20 P.2d 946, 87 A.L.R. 1281, on which appellant relies, is not in point because it relates to the extent of the mechanic's lien on the interest in fee for construction made under contract with a lessee, where after the construction the lease had been forfeited and the construction had become the property of the owner in fee; it does not contain anything which restricts the possibility of a mechanic's lien on the leasehold interest. The foreclosure in this case is correctly limited to the leasehold interest.

There may be some doubt whether the surfacing here contracted for should be considered the construction of an improvement on the land for which a lien is provided in section 1183 old (1181 new) or an improvement of the lot itself for which the lien is provided in section 1191 old (1184.1 new). Under either provision the lien will attach to the whole leasehold interest in the lot. As to the improvement of the lot itself

the sections cited expressly subject the lot or tract to the lien; as to an improvement constructed on the land, section 1185 old (section 1183.1 new) subjects the land upon which the improvement is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof to the lien. Evidently in the case of a surfaced auto court the whole lot comes under that provision.

The decision as to the foreclosure must be upheld.

The portion of the judgment awarding plaintiff interest is reversed with directions to the trial court to change this portion in accordance with the views herein expressed. In all other respects the judgment is affirmed.

GOODELL, J., concurs.



120 Cal.App.2d 747

In re MARSHALL'S ESTATE.

DUPRAY v. SECURITY-FIRST NAT.
BANK (MARSHALL, objector and
appellant).
Civ. 19492.

District Court of Appeal, Second District,
Division 1, California.

Oct. 22, 1953.

Heirship proceeding. The Superior Court of Los Angeles County, John Gee Clark, J., rendered decree and objector appealed. The District Court of Appeal, White, P. J., held that under the circumstances there was a conclusive presumption of paternity.

Affirmed.

1. Descent and Distribution ¶71(3)

Each claimant in an heirship proceeding is the adversary of the other. Probate Code, § 1080.

2. Appeal and Error ⇨151(2)

Decedent's admittedly legitimate daughter who was beneficiary of testamentary trust was interested and aggrieved party to heirship proceeding, and order therein decreeing that claimant was also legitimate daughter of decedent adversely affected interest of admittedly legitimate daughter and such daughter could appeal. Probate Code, § 1080.

3. Guardian and Ward ⇨135

The custodial guardian of decedent's admittedly legitimate minor daughter who was beneficiary of testamentary trust could prosecute on behalf of daughter an appeal from heirship proceeding order decreeing that claimant was also legitimate daughter of decedent, even though guardian of estate of admittedly legitimate daughter failed to appeal. Probate Code, § 1080.

4. Guardian and Ward ⇨28

A minor who must necessarily appear by his guardian is not bound by the admissions or actions of guardian which means sacrifice or giving away of ward's property.

5. Infants ⇨115

In absence of objection in trial court, on appeal the due representation of minor litigant will be presumed.

6. Trial ⇨59(2)

In heirship proceedings by claimant asserting that she was legitimate daughter of decedent who obtained final judgment of divorce from claimant's mother prior to claimant's birth, order of court limiting testimony to direct evidence on issue of cohabitation and opportunity of access during period when claimant would normally have been conceived was a matter of order of proof and almost entirely within trial judge's discretion, and there was no error in refusing to admit other evidence until all of testimony relating to cohabitation and access had been adduced. Probate Code, § 1080.

7. Bastards ⇨3**Evidence** ⇨89

Evidence is inadmissible to rebut a conclusive presumption, and illegitimacy cannot be established by such evidence

when there is direct and uncontradicted testimony of opportunity of access to wife by husband during period conception would normally occur, and under such circumstances with certain exceptions the presumption of legitimacy is conclusive. Code Civ.Proc. § 1962, subd. 5.

8. Bastards ⇨3

Birth certificate stating that man other than wife's husband is the father is only prima facie evidence and is open to contradiction and must fall before conclusive and indisputable presumption of legitimacy of issue of wife cohabiting with husband. Code Civ.Proc. § 1962, subd. 5.

9. Trial ⇨59(1)

In heirship proceeding by claimant asserting that she was legitimate daughter of decedent who obtained final judgment of divorce from claimant's mother prior to claimant's birth, wherein there was direct and uncontradicted testimony of cohabitation and opportunity of access to claimant's mother by decedent during period conception would normally occur, the obligation then rested upon adverse party to furnish some evidence of non-cohabitation and absence of opportunity of access before oral or written declarations of paternity were admissible, and hence statements made during his lifetime by decedent as to paternity and birth certificate stating that another man was the father were properly excluded in absence of such evidence of noncohabitation and absence of opportunity of access. Code Civ.Proc. § 1962, subd. 5.

10. Bastards ⇨3

Where the only evidence as to paternity was the indisputable presumption that issue of wife cohabiting with husband was legitimate and there was no evidence of mixed blood of claimant, whose birth certificate stated that colored man was her father, and who asserted in heirship proceeding that she was legitimate daughter of decedent, the question of miscegenation was not an issue, and hence there could be no application of asserted rule that such presumption does not apply in case of miscegenation. Code Civ.Proc. § 1962, subd. 5.

11. Appeal and Error ⇨891

The purpose of statute relating to motions in appellate courts to take additional testimony is not to convert appellate courts into triers of fact but is to enable appellate courts to make contrary or additional findings to end that judgment be affirmed or modified and affirmed and the litigation be terminated or to reverse judgment with directions to enter judgment for appellants. Code Civ.Proc. § 956a.

12. Appeal and Error ⇨891

Motion of appellate court to take additional testimony would be denied where proposed additional evidence would accomplish no more than to add to the conflicts existing in the evidence and the testimony, if taken, would not justify the appellate court in making a finding or findings contrary or additional to those of trial court and thereupon to direct entry of different judgment. Code Civ.Proc. § 956a; Rules on Appeal, rule 23.

LeSage & Bowman, Thomas W. LeSage, and Harry M. Bowman, Pasadena, for appellant.

Geo. L. Hampton, Van Nuys, for respondent.

WHITE, Presiding Justice.

This is an appeal by Lorraine Bridges Marshall, guardian of the person of Diane Marshall, a minor, from a decree in an heirship proceeding.

The factual background surrounding this litigation may be thus epitomized. John Ridgely Marshall, Jr., died testate on January 27, 1950. In his will he failed to mention Sharon Bunn, a minor, hereinafter referred to as "Sharon". In the aforesaid heirship proceeding before the superior court, sitting in probate, it was decreed and adjudged that Sharon was the legitimate daughter of decedent. An appeal from such decree is prosecuted by Diane Marshall, a minor, admittedly a legitimate daughter of decedent, by and through her guardian of the *person*, Lor-

raine Bridges Marshall. The Security-First National Bank of Los Angeles, as executor of the will of decedent and as guardian of the *estate* of Diane Marshall, prosecuted no appeal from the decree and appears herein as a respondent.

The record reflects that decedent and Margaret Dupray (who appears herein as guardian of Sharon) were married in 1939. Respondent, Diane Marshall, admittedly legitimate, was born January 19, 1941. On December 18, 1941, decedent commenced an action for divorce against respondent Margaret Dupray, alleging separation of the parties on August 16, 1941. Both parties were represented by their respective counsel. An interlocutory judgment of divorce was obtained by decedent on February 18, 1942, and a final judgment on March 18, 1943, the decedent being awarded custody of Diane. The respondent Margaret Dupray gave birth to the child Sharon on November 23, 1942. On the birth certificate it was stated that the father of Sharon was Theodore Leroy Bunn, a colored entertainer. Lorraine Bridges Marshall, who appears herein as guardian of the person of Diane Marshall, was married to decedent in August, 1946.

Respondent Margaret Dupray testified that although she and decedent had separated prior to the commencement of the divorce action, subsequently thereto on December 23, 1941, she returned to the home of decedent and on the same day her mother arrived at the home. That from the last mentioned date until some time in April or May of 1942, she, decedent, the daughter Diane, and respondent Margaret Dupray's mother, Frances Carson, all resided together in decedent's home on Carson Road in Beverly Hills, decedent and respondent Margaret Dupray occupying the one bedroom.

We shall first give consideration to respondent's motion to dismiss the appeal of Lorraine Bridges Marshall (individually) upon the ground that she is not a party aggrieved by the decree; that the decree declares her interest in the estate to be exactly as she alleged it to be in her statement of interest filed with the probate court.

Respondent also moves to dismiss the appeal of Lorraine Bridges Marshall as guardian of the person of Diane Marshall, a minor, upon the ground that the guardian is not a party aggrieved by the decree; that the same decrees the interest of Diane Marshall to be exactly as alleged in the statement of interest filed by the Security-First National Bank as guardian of her estate; and further, that Lorraine as guardian of the person is not a party to the record; that Diane was represented in the probate court by the bank as guardian of her estate, and the bank has not taken an appeal on her behalf; that the guardian of the person is not qualified by law to maintain an appeal on behalf of the minor.

Appellant in her objections to the motions shows by affidavit:

1. That the will of decedent created a trust for Diane containing a provision that should Diane not survive a certain age the trust should terminate and the trust estate be distributed to Lorraine.

2. That Lorraine filed in the probate court a statement of her interest in which she denied that Sharon was a daughter of decedent.

3. That Lorraine filed, individually and as guardian of the person objections to the petition for support of the child Sharon; that the guardian of the estate (the bank) failed to object.

4. That the petition for support and the heirship proceeding were heard together by stipulation, and the trial court, finding Sharon to be the lawful child of decedent, awarded support of \$200 per month for thirty months; that as a result of the decree of paternity Lorraine, as a contingent beneficiary under the will, suffered a possible loss of \$6,000.

5. That under the terms of some trusts in Illinois, if Sharon is legitimate, Diane will have to share equally with her in the proceeds of such trusts.

[1] In an heirship proceeding such as the one now before us, each claimant is the adversary of the other, Probate Code, § 1080; In re Estate of Friedman, 173 Cal.

411, 413, 160 P. 237; O'Day v. Superior Court, 18 Cal.2d 540, 544, 116 P.2d 621.

[2] We are satisfied that appellant's contention that a beneficiary under a trust is an interested and aggrieved party and entitled to appeal from an order which adversely affects his interest must be sustained, In re Estate of Plaut, 27 Cal.2d 424, 164 P.2d 765, 162 A.L.R. 837; In re Estate of Silver, 92 Cal.App.2d 173, 206 P.2d 895.

[3] Concerning the right of Lorraine as guardian of the person of Diane to prosecute the appeal on behalf of the minor when the bank as guardian of the minor's estate failed to appeal, we are impressed that the language in Re Estate of O'Donnell, 85 Cal.App.2d 1, 13, 192 P.2d 94, is persuasive, if not determinative of the question here presented. In the cited case, O'Donnell, an inebriate, was committed to Mendocino State Hospital. The Department of Mental Hygiene of the State of California appealed from an order made in an estate in which the incompetent had an interest. The court on appeal upheld the right of the Department to appeal as a creditor, but also said, 85 Cal.App.2d at page 13, 192 P.2d at page 101:

"But the department stands in another and far more important light. O'Donnell has been legally committed to its care. The department is the custodial guardian of the person of O'Donnell. The department in this case is trying to give its ward the protection which should have been given him by his guardian, the attorney for his guardian, and the trial court. No niceties of just who is appealing should deprive the incompetent of his right to the protection of the court. * * *

[4] Further, in support of the proposition that Lorraine as custodial guardian, has the right to protect by appeal the rights of her minor ward notwithstanding the failure of the guardian of the minor's estate to act, is the fact that a minor who must necessarily appear by his guardian is not bound by the admissions or actions of a guardian which mean the sacrifice or giving away of the ward's property, Berry

v. Chaplin, 74 Cal.App.2d 652, 657, 169 P.2d 442.

[5] Manifestly, a minor is not foreclosed from his right of appeal because of the action of a guardian of the estate in deciding not to take an appeal, and the custodial guardian should be accorded the opportunity to appeal in order to protect said minor's rights. Furthermore, in the instant proceeding the parties recognized and treated Lorraine in her representative capacity as guardian of the person of Diane, as a party to the action. In the absence of objection in the trial court, on appeal, due representation of a minor litigant will be presumed, *Neilson v. Walker*, 105 Cal.App. 23, 27, 286 P. 1091. The motions to dismiss the appeal of Lorraine Bridges Marshall, individually, and as guardian of the person of Diane Marshall, a minor, should therefore, be denied.

On the appeal upon the merits there is involved the correctness and propriety of the trial court's rulings on the admission of evidence proffered by appellant.

Section 1962, subd. 5, of the Code of Civil Procedure provides: "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."

[6] Appellant first contends that the trial court erred in limiting the evidence to direct testimony on the issue of cohabitation and access, and arbitrarily applied a (non-existent) conclusive presumption of cohabitation.

The record reflects that at a very early state of the trial, the court stated: "In order that we may keep the record straight, you may first proceed in connection with this birth, and dispose of the question as to whether or not the husband of Mrs. Dupray, that is, the decedent, the then husband had access to her during this time in question. If I decide that he did not, then these other matters may be relevant as to who she claims the father is or states who he is, these other statements which may have been made in connection with it, but in the event that I hold that he did have access to her during this period, then it becomes immaterial as to who else may

have had access to her. The conclusive presumption will then apply, and it won't be necessary to go into the matter or attempt to prove who the true father was, if there was such access."

Several times during the trial the court restated the order of proof that it would follow. An instance of this occurred when counsel for appellant Mrs. Marshall inquired of her, "Is it not a fact, Mrs. Marshall, that on numerous occasions during your married life and before, Mr. Marshall, in effect, stated to you that Sharon was the daughter of a colored man by the name of Theodore Bunn?" In ruling upon an objection to the question, the court said: "* * * I will sustain the objection and we will try first the issue of whether or not they were cohabiting during this period. If I find that they were, then I will not permit this other evidence. If I find that they were not, then you may bring in this evidence. You are not using this witness for the purpose of showing that there was no cohabitation, I take it."

In answer to a statement then made by appellant's counsel that, "* * * just because Mrs. Dupray (respondent guardian of the person and estate of Sharon) says there was cohabitation, that doesn't bind the court in any way, shape or form", the court replied: "Not at all. You are entitled to meet it, and I want you to meet that issue. It is just in the same manner as in a personal injury suit, where we try the issue of negligence without damage, because if there is no negligence, there are no damages. I think it is easier to try the issue in this way unless it is shown that some prejudice will ensue by reason of the absence of some particular witness, which you may be relying upon, but I think I will limit the testimony at this particular time to the matter of whether or not these parties were cohabiting together at the time this child was conceived."

After further discussion concerning the rulings limiting the testimony to direct evidence as to whether decedent Marshall had physical access to Mrs. Dupray, the court said: "Whether they had access is a matter of fact. It can be proved by wit-

nesses who saw them either living together or saw that he was living somewhere else at this time. If he was living somewhere else, and you have evidence to prove it, then there is a direct conflict, but that would be the sort of evidence which would be relevant to the question."

We are persuaded that the order of the court limiting the testimony to direct evidence on the issue of cohabitation and opportunity of access was a matter of the order of proof and almost entirely within the discretion of the trial judge, *In re Estate of McNamara*, 181 Cal. 82, 101, 183 P. 552, 7 A.L.R. 313.

Appellant also offered in evidence a birth certificate, the information contained in which was furnished by respondent Margaret Dupray. The certificate recited that the minor Sharon Bunn was born to Margaret Dupray on November 23, 1942, and that the father of Sharon was Theodore Leroy Bunn, a colored entertainer. Objection to the introduction into evidence of the document was sustained.

From the foregoing, we are satisfied that there was no error in the ruling of the court regulating the order of proof by requiring each party to produce whatever evidence they had on the matter of opportunity for access and cohabitation during the period that Sharon would normally have been conceived, and refusing to admit other evidence, until all of the testimony relating to the matter of cohabitation and access between decedent and respondent had been adduced.

[7,8] We are also persuaded that the rulings sustaining objections to the introduction of statements made during his lifetime by decedent Marshall as to the paternity of Sharon and of the birth certificate were correct. Evidence is inadmissible to rebut a conclusive presumption and illegitimacy cannot be established by such evidence when, as here, there was direct and uncontradicted testimony of opportunity of access to the wife by the husband during the period conception would normally occur. Under such circumstances (with exceptions not here applicable) the presumption of le-

gitimacy is conclusive. Furthermore, had the birth certificate been admitted into evidence, the fact that Theodore Bunn appears thereon as father is only *prima facie* evidence of the fact, Health and Safety Code, § 10551, was open to contradiction and must fall before the conclusive and indisputable presumption above referred to, *Hill v. Johnson*, 102 Cal.App.2d 94, 95, 96, 226 P.2d 655, and cases therein cited.

There was positive and direct evidence by respondent that she and decedent were cohabiting during the period that Sharon would normally be conceived, and this evidence was corroborated by the testimony of two other witnesses. Since appellant produced no evidence in contradiction thereof, the cases relied upon by her are distinguishable and not helpful under the circumstances here present.

[9] As to the aforesaid admissions of decedent, we are satisfied that respondent having proven circumstances showing cohabitation and an opportunity for access, the obligation then rested upon appellant to furnish some evidence of non-cohabitation and absence of opportunity of access, before declarations of paternity, either oral or written, were admissible.

[10] Appellant next urges that the conclusive presumption of paternity does not apply in the case of miscegenation. In *Re Estate of McNamara*, supra, 181 Cal. at page 96, 183 P. at page 557, the court said: "There is one class of cases where it is recognized, in this country at least, that the husband is not to be taken as the father of a child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance white, and it appears that the wife has had intercourse with a man of another race, as, for instance a negro, and the *child is of mixed blood*. (Citing cases.)" (Emphasis added.)

Conceding that the above statement correctly states the law, it could have no application to the case at bar. Appellant offered no evidence that Sharon was of mixed blood. The only reference thereto, was

when the court made the observation, "I didn't want to say this while the child was here: For the record the Court has observed that the child exhibits no Negroid features whatever, so far as her physical appearance is concerned. Her hair is straight, she appears somewhat on the blonde side, much lighter than her mother."; and again when the court declared, "There has been some intimation that the child was the child of a member of the Negro race. The Court has viewed the child, and that was significant, because the child exhibited none of the traits of the Negro race, neither in the color of her skin nor of her hair. The hair was straight. Let the record show that the youngster was an attractive youngster of nine years and her coloring was apparently lighter than her mother's and her hair, in particular, was considerably lighter and her eyes were brown. Although her eyes were brown, she was hardly a brunette."

Since there was no evidence at all except the indisputable presumption, as to paternity, it can hardly be said that the question of miscegenation was an issue in the case.

[11, 12] Pursuant to Section 956a of the Code of Civil Procedure, and Rule 23, Rules on Appeal, appellant has made a motion in this court to take additional testimony. The testimony sought to be taken is that of Theodore Bunn, the colored entertainer described in the birth certificate as the father of Sharon. The motion is based on the fact that on January 7, 1953, said Bunn testified in custody proceedings in the Matter of the Estate of Diane Marshall, a minor, and that his testimony establishes that he and Margaret Dupray cohabited continuously from 1941 to 1947, which testimony is directly contrary to the testimony of Margaret that she cohabited with Bunn only for five or six months and cohabited with the decedent from the latter part of December, 1941, to March or April, 1942.

In the opposition to the motion, it is pointed out by affidavit of respondent's counsel that appellant proceeded to trial without objection, made no request for a continuance to secure the testimony of

Bunn, nor represented to the court that she had unsuccessfully attempted to take the deposition of Bunn.

It further appears from the affidavit in opposition to the motion, that respondent's counsel and Mr. LeSage, one of counsel for appellant, journeyed to San Francisco to take the deposition of Bunn on May 2, 1952, but that Bunn failed to appear. Trial of the instant proceeding commenced on May 15, 1952. Respondent points out that Bunn is a musician and a "headliner" at some place of entertainment, either in Los Angeles, San Francisco, or some nearby town, and that his whereabouts could have been ascertained by the use of slight diligence.

Respondent also contends there has been unreasonable delay in making the application, pointing out that judgment was entered on June 20, 1952; notice of appeal was filed on August 28, 1952, and the present motion was not filed until July 28, 1953.

The testimony of Bunn taken in the custody proceeding on January 7, 1953, merely creates a conflict with the testimony of respondent and her mother, Mrs. Carson, as to cohabitation and opportunity of access during the period from December, 1941, to March or April, 1952.

The proposed additional evidence would accomplish no more than to add to the conflicts now existing in the evidence. Even though the motion to take additional testimony was granted, and the testimony taken, it would not justify this court in making a finding or findings contrary or additional to those of the trial court, and thereupon to direct the entry of a different judgment. The purpose of section 956a is not to convert appellate courts into triers of fact, *Tupman v. Haberkern*, 208 Cal. 256, 269, 270, 280 P. 970; *In re Estate of Schluttig*, 36 Cal.2d 416, 421, 422, 423, 224 P.2d 695; but to enable those tribunals to make contrary or additional findings to the end that the judgment be affirmed or modified and affirmed and the litigation be terminated, or to reverse the judgment with directions to enter judgment for the appellant, *Tupman v. Haberkern*, supra, 208 Cal. at page 269, 280 P. at pages 975, 976.

For the foregoing reasons, the motions to dismiss the appeal of Lorraine Bridges Marshall in her individual and representative capacities, are denied, the motion to take additional testimony is denied, and the decree from which this appeal was taken is affirmed.

DORAN, J., and SCOTT, J., pro tem.,
concur.



FINNEGAN v. FINNEGAN.*

Civ. 19149.

District Court of Appeal, Second District,
Division 3, California.

Oct. 26, 1953.

Hearing Granted Dec. 17, 1953.

Post-decretal proceedings in separate maintenance suit. The Superior Court, Los Angeles County, Mildred L. Lillie, Lewis Drucker, and Elmer D. Doyle, Judges, denied the wife an increased allowance for her support but directed the husband to pay her counsel fees and costs on appeal. The District Court of Appeal, Shinn, J., held that judicially-approved property settlement agreement, requiring husband to make periodic payments in full satisfaction of wife's right to support and maintenance, deprived court approving agreement in separate maintenance proceeding of right to subsequently order increased payments for wife's support, notwithstanding wife's contention that considerations of public policy should forbid a waiver or release by wife of husband's duty of support so long as marital status exists for reason that such waiver may result in wife's becoming a public charge.

Affirmed on wife's appeal and reversed on husband's appeal as to allowance of attorney's fees and costs.

1. Husband and Wife ⇨299(1)

Validity of property settlement agreement was not open to question after it had been judicially approved in separate maintenance suit.

2. Divorce ⇨245(1)

As between divorced parties, judicially-approved property settlement agreement, requiring husband to make periodic payments in full satisfaction of wife's right to support and maintenance, withdraws from court power to either increase or decrease amount agreed to be paid for support and maintenance of wife; and mere fact that decree approving property settlement also orders husband to make the agreed payments for support and maintenance of his wife does not render this rule inapplicable.

3. Husband and Wife ⇨298(1)

Where support provisions of property settlement agreement are separable from those which make a division of property, court is not bound to follow them in awarding support money.

4. Husband and Wife ⇨279(1)

Property settlement agreement showed that husband's obligation for support of wife was an inseparable part of consideration for wife's obligations under agreement.

5. Appeal and Error ⇨714(5)

On wife's appeal from trial court's refusal to increase her support allowance, court would disregard statements of testimony, asserted in wife's brief to have been given upon hearing, when it was admitted that testimony had not been reported.

6. Husband and Wife ⇨299(3)

Judicially-approved property settlement agreement, requiring husband to make periodic payments in full satisfaction of wife's right to support and maintenance, deprived court approving agreement in separate maintenance proceeding of right to subsequently order increased payments for wife's support, notwithstanding wife's contention that considerations of public policy should forbid a waiver or release by wife of husband's duty of support so long as marital status exists for reason that such

waiver may result in wife's becoming a public charge.

7. Husband and Wife ⇨301

Wife, who had promised in property settlement agreement to make no further demand upon husband, should not have been allowed attorney's fees and costs for appeal from refusal of increased support payments by court which had approved agreement, in separate maintenance suit.

8. Appeal and Error ⇨159

Where court which had approved, in separate maintenance suit, a property settlement agreement, by which wife promised to make no further demand on husband, made increase in allowance for support of child of parties but denied wife any increase in allowance to which she had agreed, it would be presumed that husband, who paid attorney's fees and costs on hearing, understood that such fees and costs were allowed for services in obtaining increase in allowance for support of child, and hence he would not be deemed to have thereby waived his right to object to allowance of fees and costs on wife's appeal.

Jerry Giesler and Harold C. Holland,
Beverly Hills, for appellant.

A. A. Goldstone, Los Angeles, for respondent.

SHINN, Presiding Justice.

Plaintiff was awarded a decree of separate maintenance August 9, 1944, by which defendant was ordered to pay, pursuant to a property settlement agreement, a certain sum monthly for the support of herself and the minor son of the parties. In September of 1950 plaintiff applied for an increase of support for herself and the son. December 7, 1950, an order was made for an increase of \$75 for support of the son and denying an increase of support for plaintiff. \$300 as attorneys' fees and \$100 court costs was awarded plaintiff's attorneys for services in that proceeding. Plaintiff appealed from that portion of the order which denied her an increased allowance. She applied for an allowance for attorneys' fees for the prosecution of her appeal and for

costs of appeal. Defendant was ordered to pay direct to plaintiff's counsel \$750 as attorneys' fees and to plaintiff \$250 as costs of appeal. Defendant appealed from this order.

Plaintiff had been granted a decree of separate maintenance May 20, 1943, by which she was awarded all the community property and \$100 per month for the support of the son. On defendant's appeal the judgment was affirmed as to those provisions and reversed insofar as it ordered a sale of certain property by a receiver. *Finnegan v. Finnegan*, 64 Cal.App.2d 109, 148 P.2d 37. April 14, 1944, the parties entered into a property settlement agreement. The judgment of August 9, 1944, recited that the agreement " * * * is intended to and is in complete settlement of all the mutual rights and liabilities of the parties hereto which were litigated herein and, as appears by the stipulation attached to this judgment, is accepted by each of said parties as full and complete satisfaction of the rights and relief to which they were entitled under the provisions of the judgment heretofore made and entered," etc. The agreement of the parties was attached to the judgment which provided that the same was in all respects approved and incorporated in the decree; the parties were directed to make the conveyances therein provided for and defendant was ordered to make the payments to plaintiff "for alimony and support therein provided for" and the parties were ordered to faithfully perform and carry out the terms of the agreement. It was ordered that defendant pay to plaintiff "the sums for alimony and support of herself and minor son as provided in Paragraph Five of said Agreement, said payments to be at the rate of Two Hundred Seventy Dollars (\$270.00) per month commencing August 5th, 1944, until said monthly sums are reduced as provided in said Agreement."

The agreement recited: " * * * said parties have agreed upon a mutual property settlement pertaining to all the property of every kind, nature and description, belonging to them, or either of them, and to be a complete and final settlement of their mutual rights and claims of every kind

and nature whatsoever and in the manner hereinafter recited." The husband received certain United States and Canadian Letters Patent and License Agreements with certain licensees, certain motion picture equipment and office furniture, all accounts and notes receivable, articles of personal adornment, all stocks and bonds and money on deposit or in which he had an interest. The wife received \$5,400 in cash "as and for alimony and support money" from the date of separation to the date of the agreement. She also received all interest in certain insurance policies and the residue of \$3,500 then on deposit after the payment of certain debts, expenses and attorneys' fees. The husband agreed not to dispose of the Letters Patent except by a bona fide sale and it was agreed that upon a sale being made plaintiff would receive an additional amount equal to 50 per cent of the sale price, provided that when and if she received \$25,000 the sum of \$170 per month of the alimony referred to was to absolutely cease, and if less than \$25,000 was received, the sum of \$170 per month was to be decreased by the proportion the sum received by her through the sale should bear to the sum of \$25,000. It was also provided that when the son became of age, expired, married or became self-supporting, the sum of \$270 should be reduced to \$170, which sum defendant agreed to pay during the natural life or until remarriage of the wife, subject to the provision for the sale of the Letters Patent. The husband agreed to secure the monthly payments by an assignment of certain License Agreements. The agreement contained comprehensive and explicit provisions that it was a full, complete and final settlement of all property rights and claims, present and future, of each party against the other and that neither should make or attempt to make any other or further claim of any kind whatsoever upon the other. Each waived the right to assert or claim any interest in the estate of the other as surviving husband or wife and each accepted the consideration receivable under the agreement in satisfaction of any and all claims with respect to property or maintenance which either party might have or claim

against the other then or thereafter. It also provided as follows: "The settlement herein made is in complete payment of any and all attorneys' fees and court costs incurred by Second Party and she assumes and agrees to pay any and all attorneys' fees and court costs incurred in the prosecution by her in the Superior Court of Los Angeles County in Superior Court case No. D-224,875."

The questions on the appeal are the following: (1) Was the obligation for plaintiff's support and maintenance an integral part of the property settlement agreement rather than an obligation imposed by the decree, and hence not subject to modification by the court? (2) Was it a valid agreement? (3) Did the agreement operate as a waiver of plaintiff's right to receive an allowance for attorneys' fees and costs upon her appeal?

It is not questioned that the court denied plaintiff's application for an increased allowance upon the ground that defendant's obligation of support in a specific amount was assumed by him and was accepted by plaintiff as an inseparable part of the property settlement agreement. The question is whether the court was in error in so construing the agreement. In our opinion the court did not err.

[1] The agreement provided for a division of all the property of the parties and, in the contingency that the Letters Patent should not be sold for \$50,000, it provided for the support and maintenance of the wife until she should die or remarry. It was in consideration of the promise of support as well as the other property rights which she had received that the wife surrendered all interest in the property which the husband received from her under the agreement. The agreement was approved by the court and its validity was not thereafter open to question. The husband had complied with the agreement in all particulars. Nothing had occurred which would have justified either of the parties in withdrawing from or repudiating the agreement.

[2] It is, of course, settled beyond question that as between divorced parties such an agreement withdraws from the court the

power to either increase or decrease the amount agreed to be paid for the support and maintenance of a wife. *Puckett v. Puckett*, 21 Cal.2d 833, 136 P.2d 1; *Adams v. Adams*, 29 Cal.2d 621, 625, 177 P.2d 265. The fact that the decree which approved the property settlement agreement also ordered the husband to make the agreed payments for the support and maintenance of the wife does not render the rule inapplicable. *Puckett v. Puckett*, supra.

[3,4] It is true, as plaintiff says, that where the contract provisions for support are separable from those which make a division of property the court is not bound to follow them in awarding support money. In contending for application of this rule plaintiff merely says: "Here paragraph 5 relating to support for wife and child is certainly severable from the provisions of paragraphs 2 and 3 relating to a division of the community property," and further that when the provisions for support and maintenance can be separated from the rest of the agreement and are incorporated into a decree they may be subsequently modified under appropriate conditions. But the provisions for support are not severable from the remainder of the agreement. To construe them as severable would violate elementary principles of the interpretation of agreements. The consideration on each side was entire. That which moved to the husband was the property he received in the settlement, the agreement of the wife to accept a specified sum under given conditions, and a waiver upon her part to demand any more in the way of support. The consideration to the wife was the property she received and the promise of support by the husband. The parties could not have more clearly stated their intentions than they were stated in the agreement. As long as the agreement was valid and in force neither party could keep what he or she had received under it and evade his or her correlative obligations. *Adams v. Adams*, supra, 29 Cal.2d 621, 177 P.2d 265.

[5] We conclude from a consideration of the agreement alone that the husband's obligation of support was an inseparable part of the consideration for the property

settlement agreement, and not merely one imposed by the decree. Times without number similar agreements have been so construed. It may be noted that upon the hearing which culminated in the order in question evidence was received by the court consisting of testimony given by plaintiff, defendant and one Henry Serlin. There is no record of this testimony and it is admitted that it was not reported. Plaintiff's brief contains statements of testimony which it is asserted was given upon the hearing. Defendant quite properly requests that these statements be disregarded, as they must be. He also says that it should be presumed that the evidence was such as to furnish support for the implied finding that the obligation of support in the agreed amount was an integral part of the property settlement agreement, citing *McMahon v. Merrill*, 112 Cal.App.2d 454, 246 P.2d 73. It is not necessary to rely upon this rule as support for that finding, or conclusion. The agreement, itself, is sufficient.

[6] Plaintiff's next contention is that the court always has jurisdiction to modify a provision for support and maintenance in a decree of separate maintenance even where the award is based upon an obligation assumed in a property settlement agreement. It is argued that considerations of public policy forbid a waiver or release by the wife of the husband's duty of support so long as the marital status exists for the reason that such waiver may result in the wife's becoming a public charge. For these propositions she cites *Monroe v. Superior Court*, 28 Cal.2d 427, 170 P.2d 473; *Weedon v. Weedon*, 92 Cal.App.2d 367, 207 P.2d 78; *Verdier v. Verdier*, 36 Cal.2d 241, 223 P.2d 214; and *Hough v. Hough*, 26 Cal. 2d 605, 160 P.2d 15. Nothing will be found in these cases which directly or in principle lends support to her contention. In none of them was there a provision for support in a property settlement agreement that had been approved by the court. Her citations from other jurisdictions are equally inapplicable.

It may not be doubted that the possibility that a wife might become an object of public charity would be an important matter for consideration when the court was called

upon to approve such an agreement in either a divorce or separate maintenance action, but as we have said, the agreement here involved was approved by the court upon plaintiff's application. Under plaintiff's theory any agreement for support, even if an inseparable part of a division of property, would be subject to rejection by the court so long as the marital status existed; however fair and equitable it might be, and however ample the provision for the wife, it would not be binding upon the parties or upon the court. This, we think, would be an unjustified curtailment of the right of husband and wife to freely contract with each other. The question whether the parties should be held bound by such an agreement is one for decision upon the facts of the particular case which have a bearing upon its fairness and the circumstances under which it was entered into. That question was answered when the court approved the agreement. If it was a fair agreement, fairly entered into, the parties had a right to adjust their lives in reliance upon its being fully performed. Such agreements are usually entered into while the marital relationship exists. It is a novel proposition that the parties are not bound by provisions for support while they remain married, although they must abide by them in the event of a divorce. It has no support in reason or authority.

The facts of the present case well illustrate the wisdom of the rules we have discussed. Before Mrs. Finnegan entered into the agreement she had been awarded by the former decree all the community property and \$100 per month for the support of the son. Those provisions of the decree had been affirmed. She transferred the patent rights, contracts and accounts for a consideration which included the right to receive support. If that support could be increased under her theory it could also be reduced by the court upon a proper showing of changed circumstances without restoring to her the property with which she had parted. Untold mischief and the disruption of settled financial arrangements of many separated spouses would result if such agreements could be set at naught.

[7] Plaintiff's application for attorneys' fees and costs on her appeal was in violation of her agreement to make no further demand of defendant. The validity of the agreement was not in question and the court had decided that it was without jurisdiction to grant any demand for support in addition to that provided in the agreement. Plaintiff's waiver of all claims that might arise in the future should have been given effect. There was no question as to the meaning of the waiver, nor is there now any contention that its terms were not broad enough to embrace future claims for attorneys' fees and costs. The decree which approved the property settlement and ordered the parties to comply with their agreement was an adjudication which barred the assertion of any and all claims of either party which would be in conflict with the waivers expressed in the agreement. The waiver as to attorneys' fees and costs was just as valid as was the waiver of the right to an increase of support money. The court was without jurisdiction to allow attorneys' fees and costs on plaintiff's appeal. *Viera v. Viera*, 107 Cal.App.2d 181, 236 P.2d 632; *McClure v. McClure*, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257.

[8] Plaintiff urges that because defendant paid \$300 attorneys' fees and \$100 costs allowed on the hearing he is estopped to object to the allowance of fees and costs on the appeal. The hearing resulted in an increase of the allowance for the support of the son and it must be presumed that the fees and costs were allowed for services in obtaining that award, or, at least, that defendant so understood it. There was no waiver of the right to object to the allowance of fees and costs on plaintiff's appeal and no estoppel.

On plaintiff's appeal the order is affirmed as to the denial of a modification with respect to the support of plaintiff; on defendant's appeal the order is reversed as to the allowance of attorneys' fees and costs on plaintiff's appeal from order denying increased support; no costs of appeal to either party.

PARKER, WOOD and VALLÉE, JJ.,

120 Cal.App.2d 829

LAND v. DEL MAR TURF CLUB et al.
Civ. 4815.District Court of Appeal, Fourth District,
California.

Oct. 26, 1953.

Action for damages because of defendant's alleged negligence, false representations and breach of warranty in giving plaintiff incorrect information as to the post position from which a horse which placed in a certain race at a race track operated by defendants started the race, with the result that plaintiff, desiring to bet, pursuant to his system, on the horse starting from such position in the next race, wagered on the wrong horse and missed a profitable bet on the winning horse which started from such position. From a judgment of the Superior Court of San Diego County, John A. Hewicker, J., for defendants, plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that the listing of both the horse which placed in the previous race and another horse as starting from such position in the official race program purchased and used by plaintiff was an inadvertent error, for which the program stated that defendant turf club assumed no liability, and that plaintiff's own testimony conclusively showed that he did not rely on such program in making his wager, so as to preclude recovery.

Judgment affirmed.

1. Contracts ⇨205

A listing of two horses, one of which placed in certain race, as starting from same post position in official race program, purchased and used by bettor failing to bet on winning horse, starting from such position in next race, because of incorrect information given him by man in information booth that horse which placed in preceding race started from another position, was an inadvertent error, for which program stated that club operating race track assumed no liability, so as to preclude bettor's recovery of damages for his resulting loss on ground of implied warranty that information given in program was correct.

2. Contracts ⇨350(1)

A horse race bettor's testimony that he attempted to ascertain which of two horses, listed in official race program as starting race from certain post position, actually occupied such position, from man in information booth, who gave him wrong information, but also told him to see race judges, one of whom told him that both horses started from such position, showed conclusively that he did not rely on program, so that he could not recover damages from race track operators for loss resulting from his failure to bet, pursuant to his system, on winning horse starting from such position in next race, on ground of implied warranty that information given in program was correct.

3. Trial ⇨59(1)

The order of proof is matter to be regulated by trial court. Code Civ.Proc. § 2042.

4. Appeal and Error ⇨1047(4)

The trial court's refusal to permit plaintiff to cross-examine defendants' witness until after plaintiff made prima facie case by producing evidence as to general facts of case and what had happened was not prejudicial to plaintiff, where such witness's deposition had been taken and plaintiff knew what general line of witness's testimony would be. Code Civ.Proc. § 2055.

Hiram T. Kellogg, Los Angeles, for appellant.

Luce, Forward, Kunzel & Scripps, San Diego, Leland C. Nielsen, Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action for damages based on allegations of negligence, false representations and breach of warranty.

The complaint alleged that on July 29, 1950, the plaintiff went to the race track operated by the defendants, paid admission and bought an "Official Program"; that pursuant to a "system" used by him he desired to bet, in the sixth race, on the horse which occupied the same post position

which was occupied by the horse which had "Placed" in the preceding race; that he proceeded to ascertain which horse had "Placed" in the fifth race and found that the program gave the post position of that horse as 5, but also listed another horse for the same position in that race; that he then consulted the man in charge of the information booth, to ascertain the true post position of the horse that had "Placed" in the fifth race, and was told that this horse had started from post position 7; that in reliance upon this information he made a wager on the horse in the sixth race which had post position 7; that the horse which started from post position 5 in the sixth race won; that he later ascertained that the horse which had "Placed" in the fifth race had started from post position 5, and not from post position 7; and that by reason of the incorrect information given him he wagered on the wrong horse and missed making a profitable bet.

After a trial the court found for the defendants, finding that the material allegations of the complaint were untrue; that no false representations were made; that the plaintiff did not rely on the information given him; and that the defendants did not warrant that the information supplied in the Official Program was accurate and correct. Judgment was entered in favor of the defendants and the plaintiff has appealed.

Conceding that there are other findings of fact which, standing alone, are sufficient to support the judgment, the appellant first contends that the finding that the defendants did not warrant the correctness of the information supplied in the Official Program is erroneous and contrary to law. It is argued that it appears, without conflict, that he was unable to ascertain which of the two post positions listed in the program for the fifth race was correct; that it must be held, as a matter of law, that there was an implied warranty that the information given in the program was correct; that he relied upon the post position of the horses, but was erroneously informed in that regard; and that if he had been given the

correct information he would have bet on the horse occupying post position 5 in the sixth race, instead of betting on the horse occupying post position 7 in that race, in which event he would have won a large amount.

[1,2] The Official Program purchased and used by the appellant was admitted in evidence. It was clearly stated thereon that "While every effort is made to avoid mistakes on the program, Del Mar Turf Club assumes no liability to anyone for inadvertent errors." The court correctly held that this was an inadvertent error. Moreover, it conclusively appears from the appellant's own testimony that he did not rely on the program as printed. He discovered the error after the fifth race had been run, and attempted to ascertain which of the two horses listed as occupying post position 5 had actually occupied that position. While he testified that Mr. Allen in the information booth gave him the wrong information in this regard, he also testified that Mr. Allen told him to go and see the judges; that he did so; that one of the judges told him that both of the horses listed had started from post position 5 in the fifth race; and that he did not believe this statement. Mr. Allen testified in all material respects exactly contrary to appellant's testimony with respect to what he said to the appellant. No implied warranty appears as a matter of law, and appellant's counsel said, in arguing to the trial court, "This action is based on misrepresentation, or wrong information given by Mr. Allen. It has nothing to do with the program." The court decided this issue against the appellant upon conflicting evidence.

[3,4] Appellant's only other contention is that the court abused its discretion in refusing to permit the appellant to cross-examine Mr. Allen under section 2055 of the Code of Civil Procedure until after he had made a prima facie case by producing evidence as to the general facts and what had happened. Mr. Allen's deposition had been taken and the appellant knew what the general line of his testimony would be.

The order of proof was a matter to be regulated by the trial court, Sec. 2042, Code Civ. Proc., and no possible prejudice appears. *Fuchs v. Southern Pacific Co.*, 5 Cal.App.2d 409, 42 P.2d 704.

The judgment is affirmed.

GRIFFIN, J., concurs.



120 Cal.App.2d 741

EPHRAIM v. JAMESTOWN JUDICIAL DISTRICT COURT et al.

Civ. 8366.

District Court of Appeal, Third District,
California.

Oct. 21, 1953.

Proceeding to prohibit Jamestown Judicial District Court (formerly Justice's Court for the Fifth Township, County of Tuolumne, Celia Wilson, Justice of Peace), from further proceeding in action against petitioner for violation of Labor Code, on ground that dismissal of first complaint for failure to timely bring cause to trial barred prosecution under second complaint. The District Court of Appeal, Peek, J., held that dismissal of first complaint did not bar prosecution under second complaint which charged separate offense.

Writ denied insofar as it pertained to separate offenses not contained in first complaint, and cause remanded with instructions.

Opinion, 260 P.2d 641, vacated.

1. Criminal Law ⇨29

The presence of a fact necessary in one offense and absent in another determines whether offenses are separate.

2. Criminal Law ⇨178

Where employee filed complaint against employer alleging that he failed to main-

tain semimonthly payroll as prescribed by Labor Code, and the complaint was dismissed for failure to timely bring cause to trial, the dismissal would bar further prosecution for the same offense. Labor Code, § 204; Penal Code, §§ 1382, subd. 3, 1387.

3. Criminal Law ⇨93

Violation of Labor Code section which required employers to pay employees within 72 hours after employees quit was not a crime such as would bring violator within criminal jurisdiction of Judicial District Court. Labor Code, §§ 202, 203, 217.

4. Criminal Law ⇨202(1)

Where complaint, alleging that employer failed to maintain semimonthly payroll as prescribed in Labor Code, was dismissed, second complaint charging employer with willful failure to pay wages and failure to have assets sufficient to pay employees was not barred by dismissal of first complaint. Labor Code, §§ 216(a), 270.

5. Constitutional Law ⇨83(3)

An employer who willfully refuses to pay wages he knows are due perpetrates a "fraud" within constitutional provision which excepts cases of fraud from the prohibition against imprisonment for debt. Labor Code, §§ 216(a), 270; Const. art. 1, § 15.

See publication *Words and Phrases*, for other judicial constructions and definitions of "Fraud".

6. Constitutional Law ⇨83(3)

Labor Relations ⇨1642

Penal provisions of Labor Code which make it a crime for employer to refuse to pay wages and to fail to have sufficient assets on hand to pay employees, does not violate constitutional provision prohibiting imprisonment for debt. Const. art. 1, § 15; Labor Code, §§ 216(a), 270.

H. J. Kleefisch, Reed M. Clarke, San Francisco, for petitioner.

T. R. Vilas, Dist. Atty., Sonora, for respondent.

PEEK, Justice.

On December 19, 1949 a complaint was filed in the respondent court charging petitioner with a violation of section 204 of the Labor Code of this state in that he had failed to maintain a semimonthly payroll for his employee during the period of August 19 to August 27 of that year. The petitioner appeared, entered a plea of not guilty and demanded a jury trial. On August 11, 1950, the case not having been set for trial, he again appeared in said court and moved that the complaint be dismissed pursuant to the provision of section 1382 (3) of the Penal Code for failure to bring the cause to trial within thirty days, which motion was granted. Three days thereafter a second complaint was issued in which petitioner was again charged with a violation of section 204 of the Labor Code, and in addition was charged with violations of sections 202, 216(a) and 270 of the same code. More than two and one-half years thereafter he filed in this court his petition by which he now seeks to prohibit respondent court from further proceedings in said action.

In support thereof he makes three contentions: (1) That the dismissal of the first complaint operates as a bar to the prosecution under the second complaint since the offenses therein set forth all arose out of and are included in the offense charged in the first complaint; (2) that the penal provisions of said section 216(a) are unconstitutional in that they are in violation of Article I, § 15 of the Constitution of this state prohibiting imprisonment for debt, and (3) that the trial court erred in refusing the application of petitioner for a change of venue predicated upon the charge of bias and prejudice of the judge of said respondent court, citing Penal Code, § 1431(1).

An examination of the record shows that the specific crime charged in the first complaint, which was sworn to by one John F. Graham, Sr., was that petitioner on the 26th day of August 1949 wilfully and unlawfully continued to employ the said John F. Graham, Sr., without maintaining semimonthly pay days for said employee as re-

quired by section 204 of the Labor Code of the State of California.

The second complaint which was sworn to by John Graham, Jr., charged in the first count thereof that petitioner, having the ability to pay, refused to pay wages to John Graham, Jr., John Graham, Sr., C. F. Porter, Jr. and Jerry P. Graham when the same were demanded of him. Section 216 (a).

Count two of said complaint charged that petitioner wilfully and unlawfully failed to pay John Graham, Jr., C. F. Porter, Jr. and Jerry P. Graham semimonthly. Section 204.

Count three of that complaint charged that petitioner wilfully and unlawfully, while engaged in the business of extracting and refining metals, failed to have on hand or on deposit cash or readily salable securities sufficient to pay the wages of the persons employed in such operation. Section 270.

Lastly count four charged that petitioner wilfully and unlawfully failed to pay John Graham, Jr., John Graham, Sr., C. F. Porter, Jr. and Jerry P. Graham within seventy-two hours after the said employees quit their employment with petitioner. Section 202.

[1] It is the general rule in this state that " 'It is not the great similarity in most of the facts constituting separate offenses, but the presence of a fact necessary in one offense and absent in another, that determines whether offenses are separate.' " *People v. Coltrin*, 5 Cal.2d 649, 661, 55 P. 2d 1161, 1167.

Analyzing the two complaints in light of the enunciated rule it is apparent that the sole offense charged in the first complaint was the alleged failure of petitioner to maintain a semimonthly payroll as prescribed in Labor Code section 204. The offense so charged is identical to that charged in count two of the second complaint. The only difference in the two violations is that the name of John F. Graham, Sr., is the only name appearing in the first complaint while in the second count of the second complaint his name does not appear but

the names of John Graham, Jr., C. F. Porter, Jr. and Jerry P. Graham were set forth.

[2] In each instance the essence of the crime charged was in no way connected with a failure to pay a particular employee but was a failure to maintain a semimonthly payroll. Hence the violation charged in count two of the second complaint was identical with the crime charged in the first complaint which was dismissed. It necessarily follows, under the provisions of section 1387 of the Penal Code, that the dismissal thereof operates as a bar to further prosecution.

At the outset of further discussion concerning the remaining counts it should be noticed that count four of the complaint charges a violation of section 202 of the Labor Code. That section specifically provides:

"If an employee not having a written contract for a definite period quits his employment, his wages shall become due and payable not later than seventy-two hours thereafter, unless the employee has given seventy-two hours previous notice of his intention to quit, in which case the employee is entitled to his wages at the time of quitting."

Section 203 provides in part that an employer who wilfully fails to pay in accordance with section 202,

"the wages of such employees shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than thirty days * * *." and that "Suit may be filed for such penalties at any time before the expiration of the statute of limitations on an action for the wages from which the penalties arise."

It is further provided in section 217:

"The Division of Labor Law Enforcement shall inquire diligently for any violations of this article, and, in cases which it deems proper, shall institute the actions for the penalties provided for in this article and shall enforce this article."

[3] Thus it would appear that by the three sections last mentioned the legislature has first determined that under certain conditions employees who quit shall be paid within certain time limits as set forth (section 202); second, that failure to so pay shall invoke the penalty provisions of section 203, and third, that under the provisions of section 217 the Division of Labor Law Enforcement is designated as the agency to institute actions for the recovery of the penalties. But in none of said sections is the violation of section 202 made a crime such as would bring a violator thereof within the criminal jurisdiction of the respondent court.

[4] However, such is not the case with counts one and three of the second complaint. The necessary elements of those crimes are wholly separate and distinct from that charged in count two. Illustrative of this is the fact that the wilful failure to pay wages as charged in the first count (Labor Code, section 216(a) in no way includes any of the elements necessary to prove that petitioner failed to maintain a semimonthly payroll as charged in count two or that he did not have assets sufficient to pay his employees in accordance with section 270 as charged in the third count. While the dismissal of the first complaint would bar further proceedings under count two of the second complaint such dismissal would not bar prosecution of the offenses charged in counts one and three since they were separate and distinct offenses.

[5] The precise point raised by petitioner in his next contention was determined adversely to him by the Supreme Court in the case of *In re Trombley*, 31 Cal.2d 801, 193 P.2d 734. There the court, in holding that section 216 of the Labor Code was constitutional, stated that "The word 'wilfully' as used in criminal statutes implies a purpose or willingness to commit the act (Pen.Code sec. 7, subd. 1), and although it does not require an evil intent, it implies that the person knows what he is doing, intends to do what he is

PEOPLE v. BENNETT.

Cr. 874.

District Court of Appeal, Fourth District,
California.

Oct. 26, 1953.

doing, and is a free agent." 31 Cal.2d at page 807, 193 P.2d at page 739. Hence, when subdivision (a) of section 216 of the Labor Code is construed together with the above-mentioned Penal Code section defining the word "wilful" an employer having the ability to pay who knowingly and intentionally refuses to pay wages which he knows are due, is guilty of a crime denounced by that section. The court therein further observed that the historical background of the constitutional provision shows that the provisions were adopted to protect the poor but honest debtor who is unable to pay his debts but such guarantees "were not intended to shield a dishonest man who takes an unconscionable advantage of another." Under such circumstances the employer who wilfully refuses to pay wages he knows are due, perpetrates a fraud within the meaning of the provision which excepts cases of fraud from the prohibition against imprisonment for debt.

[6] The same conclusion must follow as regards the alleged violations of section 270. No element of wilful failure to pay wages is present. The crime consists in not having sufficient money or securities on deposit or on hand to pay the wages of all persons employed on the mining property or in connection therewith. Therefore neither violations would come within the constitutional prohibition.

By reason of the concession made by respondent, that since he believes petitioner is entitled to a change of venue and that the case should be transferred to an adjoining township, it becomes unnecessary to discuss petitioner's final contention.

The writ is granted insofar as it pertains to any proceeding under counts two and four of the second complaint. The writ is denied insofar as it pertains to counts one and three of said second complaint, and the cause is remanded to respondent court with instructions to transfer the same to the Justice Court of the First Judicial District.

VAN DYKE, P. J., and SCHOTTKY,
J., concur.

Petition by prisoner, who claimed that he was being unlawfully held, for writ of error coram nobis. The Superior Court of Fresno County, George M. DeWolf, J., entered order denying petition, and prisoner appealed. The District Court of Appeal, Barnard, P. J., held that where evidence, at most, was conflicting as to whether prisoner had been induced in 2 prosecutions to plead guilty by promises and bargaining of district attorneys, relief would be denied.

Order affirmed.

1. Criminal Law ☞163

Where prisoner pleaded guilty and was given probation, by order which allegedly did not make prison sentence condition of probation and probation was subsequently revoked and prisoner was sentenced to prison, there was no double jeopardy, since order granting probation was not a judgment.

2. Criminal Law ☞997(15)

In proceeding by prisoner, who claimed that he was being unlawfully held, for writ of error coram nobis, where evidence, at most, was conflicting as to whether prisoner had been induced in two prosecutions to plead guilty by promises and bargaining of district attorneys, relief would be denied.

3. Criminal Law ☞997(1)

In proceeding by prisoner, who claimed that he was being unlawfully held, for writ of error coram nobis, where all factual matters relied upon were known to prisoner at time judgments of conviction were entered, all points raised could have been raised on appeal and no reason or excuse for delay of two years in seeking relief was offered, relief would be denied.

Donald F. Manfredo, Fresno, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order of the Superior Court denying a petition for writ of error coram nobis. Donald F. Manfredo was appointed by this court to represent the appellant. He has filed a report with a full and careful review of the record, including a painstaking examination of the prior proceedings, and stating that he has been able to find no meritorious ground for the appeal. *People v. Dodd*, 113 Cal. App.2d 682, 248 P.2d 965; *People v. Sutton*, 115 Cal.App.2d 751, 252 P.2d 633. After studying the record we agree with this conclusion.

It appears that the appellant pleaded guilty to a charge of forgery and was given probation on December 4, 1947, one of the conditions being that he serve six months in the county road camp. In 1949, he pleaded guilty to a charge of armed robbery and was sentenced to prison. On the same day, his probation in the other case was revoked and he was also sentenced to prison on that charge, the two sentences to run concurrently.

In his petition the appellant contends that his imprisonment on the 1947 charge is illegal because the district attorney "bargained" with him and thus induced him to plead guilty to this charge in order to secure probation; and because he was placed in double jeopardy for the same offense by being sentenced to prison after he had been given probation by an order which did not make a prison sentence a condition of probation. It is further claimed that the conviction on the other charge in 1949 is illegal in that he was not arraigned within the proper time; in that he was placed on the stand as a witness against himself; in that his plea was taken without the presence of counsel; in that he was not informed of his constitutional rights; in that the district attorney told him that if he would plead guilty to that charge other charges against him would be dropped; and in that he was not properly identified by the victim of the robbery.

[1,2] The record does not sustain any of these contentions. The order granting probation was not a judgment, and no double jeopardy appears. *People v. Wallach*, 8 Cal.App.2d 129, 47 P.2d 1071; *People v. Williams*, 93 Cal.App.2d 777, 209 P.2d 949; *People v. Lippner*, 219 Cal. 395, 26 P.2d 457. Appellant's claims of promises and bargaining by which he was induced to plead guilty in the two cases are all denied. The most that could be said is that there is conflicting evidence on this point. The record in connection with the robbery charge in 1949 shows, without conflict, that the appellant was fully advised of his rights, that he voluntarily testified as a witness, that he was represented by counsel, and that he was identified by the victim of the robbery.

[3] Moreover, all of the factual matters relied on were known to the appellant at the time the judgments were entered, all of these points could have been raised on appeal, and no reason or excuse for the delay of two years in seeking relief is offered.

The order appealed from is affirmed.

GRIFFIN, J., concurs.



120 Cal.App.2d 806

MANSHEL v. MANSHEL et al.

Civ. 19547.

District Court of Appeal, Second District,
Division 2, California.

Oct. 26, 1953.

Wife's divorce action. The Superior Court, Los Angeles County, Ralph K. Pierson, J., entered an interlocutory decree, and wife appealed alleging error in the awarding to the husband as a separate property a certain parcel of land. The District Court of Appeal, McComb, J., held that the evidence showed that the land had been acquired by the husband during cover-

ture as a gift and that the only money expended by him on behalf of the land was \$750 in settlement of a tax claim so that the only interest the wife had in the property as community property was one-half of the amount paid for the release of the tax claim.

Affirmed.

1. Husband and Wife ⇨264

In suit for divorce, evidence showed that certain land acquired by husband during coverture was acquired as a gift and that the only money expended by the husband on behalf of the land was \$750 to settle tax claim against the land.

2. Husband and Wife ⇨250

Where husband had acquired land as a gift during coverture and had spent \$750 in settlement of tax claim against the land, the only interest his wife had in the property as community property was one-half the amount paid for the release of the tax claim.

H. Sidney Laughlin, Los Angeles, for appellant.

Ben Gould, Los Angeles, for respondent.

McCOMB, Justice.

Plaintiff appeals from an interlocutory decree of divorce granted her on the ground of extreme cruelty.

She waives all alleged error except the awarding to defendant as his separate property a parcel of 40 acres of land. The parcel of land in question is located in the Antelope Valley and was acquired during the time the parties were husband and wife.

[1,2] The sole question necessary for us to determine is:

Was there any substantial evidence to sustain the trial court's finding that the parcel of land in question was a gift to defendant during coverture?

This question must be answered in the affirmative. Defendant testified that the property in question was given to him by Fred P. Glick; Mr. Glick testified he made a gift of the property to defendant; both testified that no consideration passed from

defendant to Mr. Glick for the property; and Mrs. Glick gave testimony to the same effect. There was also evidence that defendant paid a Mr. William E. Irish \$750 in settlement of a tax claim against the property which money he had obtained as a loan from his brother-in-law.

Clearly the foregoing evidence showed the only interest plaintiff had in the property in question as community property was one half the amount defendant paid for the release of the tax claim, or \$375. Since the court made an order that only one half the community debts be charged against the community property and these totaled \$3,450, it is clear the trial court made a proper allowance for plaintiff relative to this sum, and she is not in a position to complain here.

Needless to say, other evidence contrary to that set forth above must be disregarded by this court.

Affirmed.

MOORE, P. J., and FOX, J., concur.



120 Cal.App.2d 778

RADEN v. LAURIE et al.

Civ. 19600.

District Court of Appeal, Second District,
Division 3, California.

Oct. 23, 1953.

Hearing Denied Dec. 17, 1953.

Action on agreement requiring plaintiff, in return for ten per cent commission on artist's professional earnings, to give artist counsel and advice and to assist her generally in her training for a professional career and in selection and employment of agents. The Superior Court of Los Angeles County, Roy L. Harndon, J., entered summary judgment for defendant artist, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that, upon motion of artist and her mother for sum-

mary judgment, plaintiff's affidavit should have been taken as true, and, therefore, his denial that he had agreed or endeavored to obtain engagements of employment for artist was sufficient answer to the motion, which was grounded upon fact that plaintiff was an unlicensed artists' manager or employment agent.

Reversed.

1. Licenses ⇨11(1)

One is not an "artists' manager" unless he both advises, counsels, and directs artists in development or advancement of their professional careers and also procures, offers, promises, or attempts to procure employment or engagements for an artist only in connection with and as a part of duties and obligations of such person under contract with such artist by which such person contracts to render services of such nature to artist. Labor Code, § 1650.

See publication Words and Phrases, for other judicial constructions and definitions of "Artists' Manager".

2. Licenses ⇨11(1)

In absence of evidence that agreement, by which plaintiff promised to give artist counsel and advice and to generally assist artist in her training for professional career and in selection and employment of agents, was mere subterfuge for contract making plaintiff artist's manager, clear and positive provisions of agreement would be given effect. Labor Code, § 1650.

3. Licenses ⇨39.48

Presumption was that parties acted in good faith in entering into agreement by which plaintiff was to give artist counsel and advice and to generally assist artist in her training for a professional career and in selection and employment of agents. Labor Code, § 1650.

4. Judgment ⇨186

Upon motion for summary judgment by artist and her mother in action upon agreement under which plaintiff was required to give artist counsel and advice and to assist artist generally in her training for a professional career and in selection and employment of agents, doubt, if any, whether such agreement was entered into

in good faith as substitute for earlier agreement under which plaintiff, who was not a licensed artists' manager, was employed as non-exclusive manager, should have been resolved in favor of plaintiff since such question was not to be decided upon the motion. Labor Code, § 1650.

5. Labor Relations ⇨17

Licenses ⇨39.48

Where plaintiff was employed only to counsel and advise artist and to act as her business manager in matters not related to obtaining engagements for her, plaintiff was not acting as an "employment agency" within labor code provision defining such agency, and, therefore, plaintiff's failure to obtain employment agency license would not preclude him from suing for compensation allegedly due under his employment contract. Labor Code, § 1551.

See publication Words and Phrases, for other judicial constructions and definitions of "Employment Agency".

6. Judgment ⇨185

In action on agreement requiring plaintiff, who was not a licensed artists' manager, to give artist counsel and advice and to assist artist generally in her training for professional career and in selection and employment of agents, wherein labor commissioner filed amicus brief contending that agreement was sham and subterfuge designed to conceal fact that plaintiff was acting as an artists' agent, evidence upon such issue was for trier of fact at trial and not for consideration upon motion of artist and her mother for summary judgment. Labor Code, § 1551.

7. Infants ⇨58(1)

Where, under agreement with minor artist and her mother, plaintiff was required to give artist counsel and advice and to assist artist generally in her training for a professional career and in selection and employment of agents, disaffirmance of agreement by minor did not operate to terminate mother's obligation.

Fred J. Martino, Beverly Hills, for appellant.

Bautzer, Grant, Youngman & Silbert, Beverly Hills, A. Fredric Leopold, Los Angeles, for respondent.

Pauline Nightingale, Edward M. Belasco, Leon H. Berger, for Amicus Curiae, Labor Commissioner, on behalf of respondent.

SHINN, Presiding Justice.

Plaintiff appeals from a summary judgment entered in favor of defendant Charlotte Jacobs. Rosetta Jacobs, also a defendant, was not served. Defendant's motion for summary judgment was heard upon the complaint, the answer of defendant, and affidavits of Charlotte Jacobs and plaintiff. The ground of the motion was that the action has no merit.

In January, 1948, by an undated writing signed by plaintiff, by Rosetta Jacobs and Charlotte Jacobs, plaintiff was employed as a non-exclusive manager of Rosetta Jacobs with the duty of "the securing of engagements for me in the motion picture, theatrical, radio, television and allied fields with and upon the consent of myself and my legal guardian, Mrs. Charlotte Jacobs, and in accordance with our wishes," for a consideration of ten per cent of all moneys

received from engagements obtained directly or indirectly by plaintiff. No time was specified for duration of the agreement. On July 30, 1948, a second agreement was entered into.¹

Plaintiff sued on the second agreement alleging that Rosetta Jacobs, who it seems uses the name of Piper Laurie, had earned a considerable sum of money for professional services and had paid none of it to plaintiff; \$3,100 was demanded as plaintiff's share of the earnings. It appeared from the affidavit of Charlotte Jacobs, the mother of Rosetta, that the latter was a minor, born January 22, 1932, and that on October 12, 1949, Rosetta by means of a communication addressed to plaintiff and signed by one Benj. T. Weinstein, terminated and disaffirmed the agreement of July 30, 1948. The affidavit also asserted that when the January 1948 agreement was executed plaintiff stated to Rosetta and Charlotte that he would obtain employment in the entertainment field for the former, and that the same was the understanding between the parties until the notice of disaffirmance; that during 1948 and 1949, plaintiff attempted unsuccessfully to obtain such employment and several times

1. "July 30, 1948

Mr. Ted Raden

1177 N. Ardmore Ave.

Los Angeles 27, Calif.

"Dear Mr. Raden:

"This will set forth our agreement as follows:

"You have heretofore rendered your services to us in counseling and advising us in connection with the professional activities of the undersigned, Rosetta Jacobs (professionally known at this time as 'Piper Laurie') and generally assisting in her training and preparation for a professional career.

"The undersigned and each of them hereby employ you to continue the rendition of your services as our advisor and counsel and as business manager for the undersigned Rosetta Jacobs for the period commencing on the date hereof and extending up to and including the date when said Rosetta Jacobs shall reach her twenty first birthday to counsel and advise us in connection with all business and financial matters relating to the professional activities of the undersigned,

Rosetta Jacobs, including but not limited to her dealings with agent representatives and employers.

"You hereby accept the said employment and agree to use your best efforts and devote so much of your time and attention as may reasonably be required in the rendition of your services hereunder. It is expressly agreed that you shall not be required to devote your entire time and attention to the rendition of your services hereunder, and that nothing herein contained shall be deemed to require you or authorize you to seek or obtain employment for the undersigned, Rosetta Jacobs. One of your duties hereunder shall be to counsel and advise us in connection with the selection and employment of agents to represent the undersigned, Rosetta Jacobs, from time to time in obtaining employment of her services. * * *" (Signatures.)

The agreement was signed by the three persons and it specified that plaintiff was to receive as compensation ten per cent of all the professional earnings of Rosetta.

took Rosetta to places where entertainers might find employment. It was also alleged that plaintiff presented the July writing saying merely that it was "a better form." It was further alleged, and is conceded to be a fact, that plaintiff was not licensed as an employment agent or artists' manager, and that the agreement was not approved by the Labor Commissioner of the State of California. While it was alleged that plaintiff did not handle any money for Rosetta or any records or books for her, it was not alleged that he did not keep and perform his obligations under the July 30th agreement. Plaintiff filed an affidavit setting forth that he counseled and advised both defendants respecting Rosetta's career, and in his affidavit he detailed the services which he rendered in transforming her from a "reticent, bashful, introverted, unassuming personality, without appeal, conversational ability, poise, or any social equilibrium" into a mature, interesting, and attractive personality with poise and aplomb which brought forth her ability and possibilities. The affidavit admitted that plaintiff had taken Rosetta to places where entertainers might have found employment, but denied that it was for the purpose of obtaining employment, and alleged that it was for the general development and education of the young woman. It was denied in the affidavit that plaintiff stated to either of the defendants that he could or would obtain employment for Rosetta. It was alleged that the agreement of January, 1948, was merged in and superseded by the agreement of July 30, 1948. It was also alleged that defendant Charlotte contributed a sum of money which affiant used to pay a part of the costs of a short motion picture which plaintiff caused to be written, directed and produced, starring Rosetta, and in which she made her professional debut. These services, it was alleged, continued over a period of more than

a year and until Rosetta obtained a contract with Universal International Studio, at which time plaintiff was cast aside.

[1] Plaintiff was not licensed as an artists' manager, theatrical manager or employment agent. It is said by respondent that her motion was granted upon the ground that plaintiff was either an unlicensed artists' manager or employment agent. The definition of artists' manager is contained in § 1650 of the Labor Code.² One is not an artists' manager unless he both advises, counsels and directs artists in the development or advancement of their professional careers, and also procures, offers, promises or attempts to procure employment or engagements for an artist "only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist." Such is the clear wording of the statute.

We have experienced some difficulty in understanding defendant's construction of the section. It appears to be contended that one who is employed to advise, counsel and direct an artist, thereby promises to procure or attempt to procure employment for his principal; therefore, despite the language of the agreement, plaintiff was bound to seek employment for Rosetta; his efforts to do so were a part of his duties of counseling and advising and he was therefore an artists' manager.

The July agreement is explicit and unambiguous. It specifically provides that plaintiff has no authority and no duty to seek or obtain employment for Rosetta Jacobs. He is required only to give counsel and advice and to assist generally in her training for a professional career and the selection and employment of agents. Although it was alleged in the affidavit of

2. "An artists' manager is hereby defined to be a person, who engages in the occupation of advising, counseling, or directing artists in the development or advancement of their professional careers and who procures, offers, promises or attempts to procure employment or engage-

ments for an artist only in connection with and as a part of the duties and obligations of such person under a contract with such artist by which such person contracts to render services of the nature above mentioned to such artist."

Charlotte that plaintiff endeavored, unsuccessfully, to obtain employment for Rosetta, there was no showing that he procured, offered, promised or attempted to procure employment or engagements for Rosetta "only in connection with and as a part of the duties and obligations of such person under a contract with such artist." It would seem clear that his duties were intentionally limited to the rendition of services which would not require his being licensed as an artists' manager.

Respondent says: "It is the act of seeking employment, not the contract provision, which brings the legislation into play." This might be true if the contract were a mere sham and pretext designed by plaintiff to misrepresent and conceal the true agreement of the parties and to evade the law. But there was no evidence which would have justified the court in reaching that conclusion. There was no evidence of misrepresentation, fraud or mistake as to the terms of the contract nor as to plaintiff's obligations thereunder, nor evidence that defendants did not understand and willingly accept the limitation of plaintiff's duties. The assertions in defendant's affidavit that in January, 1948, plaintiff represented that he could and would obtain employment for Rosetta, while immaterial, were denied in plaintiff's affidavit. By the former agreement plaintiff undertook to seek engagements for Rosetta and to act as her manager, but not so under the July agreement.

[2-4] In the absence of any evidence that the July 30th agreement was a mere subterfuge or otherwise invalid the court was required to give effect to its clear and positive provisions. It was to be presumed that the parties acted in good faith. If there was a doubt whether the later agreement was entered into in good faith, as a substitute for the earlier one, and that it expressed the real intentions of the parties, it should have been resolved in favor of plaintiff. These were not questions to be

decided on a motion for summary judgment. *Gale v. Wood*, 112 Cal.App.2d 650, 247 P.2d 67; *Grueninger v. Livingstone & Co.*, 90 Cal.App.2d 266, 202 P.2d 785.

In plaintiff's affidavit it was also denied that plaintiff had promised, or that he attempted to obtain engagements or employment for Rosetta.

On the motion for summary judgment the averments of plaintiff's affidavit should have been taken as true. *Weichman v. Vetri*, 100 Cal.App.2d 177, 223 P.2d 288; *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal.2d 553, 122 P.2d 264; *U. S. Fidelity & Guar. Co. v. Sullivan*, 93 Cal.App.2d 559, 209 P.2d 429. Therefore, plaintiff's denial that he agreed or endeavored to obtain engagements or employment for Rosetta was a sufficient answer to the motion for summary judgment.

[5] Since plaintiff was employed only to counsel and advise Rosetta and to act as her business manager in matters not related to obtaining engagements for her, he was not acting as an "Employment Agency" as defined by § 1551, Labor Code.

[6] The Labor Commissioner has filed an amicus brief in which he contends that the later agreement was a sham and subterfuge designed to conceal the fact that plaintiff was acting as an artists' manager. Upon the evidence that was before the court this contention, of itself, presents an issue for regular trial procedure.

[7] We find no merit in the claim that the disaffirmance of the agreement by the minor operated to terminate the obligation of Charlotte Jacobs who, presumably, was entitled to receive the earnings of her daughter, and was one of plaintiff's employers.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

DUNN v. PACIFIC GAS & ELECTRIC CO.*

No. 15489.

District Court of Appeal, First District,
Division 1, California.

Oct. 23, 1953.

Hearing Granted Dec. 17, 1953.

Action was brought against electric power company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with electric power line, which company had easement to maintain over district's park property where district was preparing for construction of golf driving range. The Superior Court of the State of California, in and for the Contra Costa County, Hugh H. Donovan, J., entered judgment of nonsuit against special administratrix of estate of employee, and she appealed. The District Court of Appeal, Bray, J., held that questions of negligence, contributory negligence, and proximate cause were for jury.

Judgment reversed.

1. Electricity ☞14(2)

Where one rule of Public Utilities Commission provided that in rural districts minimum clearance of power lines might be reduced to 22 feet above ground where lines cross portions of public or private roads or driveways, and another rule provided that in rural areas, clearance might be reduced to 18 feet lines across areas capable of being traversed by agricultural equipment, second rule was applicable in action against electric company to recover for death of one who was electrocuted in rural district and not on road, though power line in question at some points crossed roads.

2. Electricity ☞14(1)

Lack of contractual relationship between person injured by electric power line or his employer and owner of power line is not sole criterion in determining measure of duty required of the owner with respect to person injured.

3. Electricity ☞15(1)

Park District's employees engaged in filling and leveling district's park property

* Subsequent opinion 272 P.2d 745.

preliminary to construction of golf driving range and parking area were not "trespassers" on that portion of park property over which electric power company had an easement to maintain power lines, and therefore company had duty to use reasonable care to avoid injuring such employees.

See publication Words and Phrases, for other judicial constructions and definitions of "Trespasser".

4. Electricity ☞14(1)

Electric power company, in maintaining power lines, should use that standard of care that a person of ordinary prudence would exercise under the circumstances.

5. Electricity ☞14(1)

In determining whether electric power company, in maintaining electric power lines, has used required standard of care, one of the circumstances to be considered is the dangerous character of electricity and inherent risk of injury to persons or property if electricity escapes.

6. Electricity ☞14(1)

Care used by electric power company in maintaining power lines must be commensurate with and proportionate to the danger.

7. Electricity ☞19(9)

In action against electric company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, question whether company used reasonable care towards deceased employee of district was for jury.

8. Electricity ☞19(9)

In action against electric company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, question whether sole proximate cause of death of employee was negligence of truck driver

in moving truck with body elevated under wires was for jury.

9. Death ☞58(1)

In action against electric company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, presumption of due care applied to acts of truck driver, who was also electrocuted.

10. Electricity ☞19(12)

In action against electric company to recover for death of park district's employee, who was electrocuted when dump truck's elevated body came in contact with electric power line which company had easement to maintain over district's park property where district was preparing for construction of golf driving range, whether deceased employee was contributorily negligent was for jury.

Wm. B. Mead, Oakland (Cyril Viadro, San Francisco, of counsel), for appellant.

Robert H. Gerdes, San Francisco, Carlson, Collins, Gordon & Bold, John Ormasa, Richmond, for respondent.

BRAY, Justice.

Plaintiff appeals from a judgment of nonsuit against her.

Questions Presented.

The determination of whether there was any evidence which would have supported a judgment in plaintiff's favor involves: (a) What duty does the owner of high tension wires owe workmen on premises underneath its wires, where such owner has knowledge of impaired clearance? (b) Was such duty fulfilled here as a matter of law or should its determination have been left to the jury? (c) As to contributory negligence, did the evidence as a matter of law dispel the presumption of due care?

Facts.

Austin Dunn, husband of Dolores Dunn, was employed by the East Bay Regional

Park District as a bulldozer operator. Upon his death in the accident hereafter described, Dolores as special administratrix of his estate brought this action for damages for his death.

During the week of June 20, 1949, the district commenced to fill and level a portion of its Tilden Park property preliminary to the construction of a golf driving range and parking area. Traversing a portion of the area being filled were uninsulated high tension (12,000 volts) wires of defendant. Dirt and rocks were dumped over the entire area by employees and trucks of a contractor. Dunn's job was to spread this dirt and rocks with his bulldozer. When Collins, the district's golf course superintendent, was busy elsewhere, Dunn would tell the truck drivers where to dump. By Wednesday morning the level of the ground under the wires had been raised approximately 6 feet, leaving the distance between the wires and the top of the filled ground about 12 feet 6 inches. Thursday morning, defendant's foreman with some of its workmen went to the area to install a transformer. The foreman saw loaded trucks proceeding under the wires. He talked to Collins, calling attention to the fact that the clearance above the road was not 25 feet and that the wires carried high voltage. Thereupon Collins started stopping the truck drivers, telling them the wires were hot and to stay out from under them. Among the truck drivers he warned was one Hickman. He also warned Dunn. He returned to the foreman and asked what the latter was going to do. The foreman stated that his company would have to put in a higher pole. That afternoon defendant's assistant supervisor of electrical estimates and records, Rucker, having received a report of the hazardous condition, visited the area. He saw trucks passing under the wires. He saw Dunn, warned him of the proximity of the wires, that they carried 12,000 volts, that there should be no dumping there, and that trucks and his bulldozer should not go under the wires. Dunn told him he had already been warned by another of defendant's men. Rucker then contacted the chief aide to the district's manager, Flood, who returned to the area with him.

He told Flood he would have an estimator there the next day to see about raising the pole. He told Flood it was a dangerous situation and trucks should not go under the wires. Flood then called Dunn over and instructed him not to permit any more dumping within 10 feet of the line. Both Flood and Dunn told Rucker that no more dumping would be permitted in the impaired clearance area and not closer than 10 feet from the wires. He was told that the fill had been finished in the impaired clearance area. Returning to his office, Rucker asked that an estimator be sent to meet with Flood the next morning.

Friday morning Collins told Dunn to stay out from under the wires, not to dump or push anything in there. He also warned the truck drivers to stay out. On Wednesday he had also told Dunn not to dump or push anything in that area as it was finished.

Shortly before 1 p. m. Friday, Adams, an employee of the district, drove Dunn in his garbage truck from the club house to the intersection of the road leading into the parking area with the golf course drive. Dunn got off the truck and started towards the parking area. When last seen by Adams, Dunn was approximately 700 or 800 feet from and walking in the general direction of the wires. Adams continued on to the driving range shack. He saw Hickman's dump truck coming into the area. He went into the shack, talked to the carpenter in there for a couple of minutes and then he and the carpenter walked outside. They saw Dunn and Hickman lying on the ground. Dunn's head was practically in front of the left front wheel of Hickman's dump truck. His legs were extending towards the rear of the truck. Hickman was lying face down, underneath the running board, his head towards the rear of the truck. His feet were parallel to the truck. Dunn moved his arms, hitting the wheel of the truck and there was a big flash. Hickman was moving on the ground and every time he touched the running board with his back and shoulders there was a flash. As Hickman moved around he touched Dunn's body. Both men were

electrocuted. The bed of the truck was elevated touching the wire.

Required Clearance.

The actual clearance at the place of the accident, prior to the making of the fill, was 18 feet 6 inches. There is considerable controversy as to what rule of the Public Utilities Commission applied. In 1948 the district had granted defendant an easement for these lines. General Order 95, Rule 37, dated 1941, provides that the basic minimum clearance above ground along thoroughfares in rural districts or across other areas capable of being traversed by vehicles or agricultural equipment is 25 feet. Rule 54.4-A(2) (a) provides that in rural districts the minimum clearance may be reduced to 22 feet above ground "for conductors crossing or overhanging traversable portions of public or private roads or driveways." Another rule, 54.4-A(2) (b), provides that in rural areas the clearance may be reduced to 18 feet "for lines across areas capable of being traversed by agricultural equipment and along roads where no part of the line overhangs any traversable portion of a public or private roadway." For at least 6 years prior to the accident and thus prior to the grant of the easement, there was and is a road which passed under that portion of the lines which was less than 22 feet above the ground before the fill was made.

[1] While the accident happened near the road which the power lines crossed, there is no evidence that it happened on the road area nor does the evidence disclose how near to it. Therefore, the rule applicable would be 54.4-A(2) (b), as the area was in a rural district and capable of being traversed by agricultural equipment. Plaintiff contends that rule 54.4-A(2) (a) (the 22 foot rule) applies, construing that rule to mean that if the lines cross a roadway in a rural district that minimum must be provided for the entire district. But reading 54.4-A(2) (a) and 54.4-A(2) (b), it is obvious that the 22 foot requirement applies only to the lines crossing or overhanging traversable portions of public or private roads. The mere fact that the lines cross such roads does not require a clear-

ance greater than 18 feet at any point other than at such roads. Prior to the making of the fill there was such clearance.

(a) Defendant's Duty.

Thursday defendant knew of the condition and realized the danger from the impaired clearance. Defendant contends that as there was no contractual relationship between it and the district or the latter's employees, Dunn was, in effect, a trespasser as against it, and the only duty owed him was for the defendant to refrain from wilful or wanton injury. In support of this theory it cites *Hall v. Southern California Edison Co., Ltd.*, 137 Cal.App. 449, 30 P.2d 1013; *Leslie v. City of Monterey*, 139 Cal.App. 715, 34 P.2d 837; *Hayden v. Paramount Productions, Inc.*, 33 Cal.App.2d 287, 91 P.2d 231; *Rojas v. Southern California Edison Co.*, 105 Cal.App.2d 258, 233 P.2d 141; *Strother v. Pacific Gas & Electric Co.*, 94 Cal.App.2d 525, 211 P.2d 624, all of which under the facts of the particular case seem to support the principle stated. In the *Hall* case, 137 Cal.App. 449, 30 P.2d 1013, the plaintiff ascended one of the defendant's poles which turned out to be defective, cut the wires which held it, causing the pole to fall, injuring him. As stated in the opinion, there was no express or implied invitation by the defendant for the plaintiff either to climb the pole or cut the wires. While the decision that the defendant owed the plaintiff no duty of ordinary care is based partly upon the fact that there was no contractual relationship between the defendant and the plaintiff or the plaintiff's employer, still it is also based upon the absence of any express or implied invitation to climb the pole. Nor was there any knowledge on the part of the defendant that the plaintiff was about to do so. The *Leslie* case, 139 Cal.App. 715, 34 P.2d 837, was one where employees of a contractor engaged by the city of Monterey to erect a backstop at the city's ball grounds were injured when a pole they were erecting struck the defendant's power lines. The lines were along the street outside the ball park, before the city as a part of the operation moved its fence underneath them. There was no evidence that the defendant knew of the work being done or of the change in

location of the fence. The court applied the above rule to those circumstances. In the *Hayden* case, 33 Cal.App.2d 287, 91 P.2d 231, the defendant Department of Water and Power of the City of Los Angeles had a right of way for power lines over the Paramount property. Paramount let a contract for the construction of a building on the property. In raising steel for the new building the boom of the crane came in contact with the power lines, injuring the plaintiff, an employee of the steel subcontractor. The opinion states, 33 Cal.App.2d at page 291, 91 P.2d at page 235: "It is at once apparent from the foregoing facts that the proximate cause of plaintiff's injuries was not any negligence on the part of the defendants but was primarily and proximately attributable to the negligence" of the steel contractor's employees. While there was some sagging of the wires, there still was a clearance of over 45 feet above the ground. The court stated that the department could not reasonably be expected to anticipate that anyone would project a boom to more than 45 feet above the ground and contact the wires, the position of which and their danger the court found to be known to the crane operator. While the court mentioned that neither the plaintiff nor the crane operator was employed by the department, it did not apply the lack of contractual relationship rule; rather it based its decision on (1) the fact that there was no evidence that the department knew of the work being done and (2) that the sole proximate cause of the accident was the negligence of the crane operator. Moreover, the court appeared to apply the duty of reasonable care on the part of the department, for it said, 33 Cal.App.2d at page 293, 91 P.2d at page 236: "The standard of ordinary and reasonable care was attained by the city so far as its conduct is here concerned, for this means such care as a reasonably careful and prudent person, having in view the dangers to be avoided, and the likelihood of injury therefrom, would exercise, under the circumstances, in order to prevent injury. * * * Reasonable care, not insurance against every possible accident, is the measure of liability." In the *Rojas* case, 105 Cal.App.

2d 258, 233 P.2d 141, the decision was based principally upon the finding that there was no evidence from which the power company "might reasonably have anticipated that plaintiff would place a metal shaker over 33 feet in length in contact with the transmission wire." 105 Cal.App.2d at page 260, 233 P.2d at page 143. Again, the defendant's wires had been in the same condition as to clearance for over 26 years, and complied with the requirement of the Public Utilities Commission. In the Strother case, 94 Cal.App.2d 525, 211 P.2d 624, the court held that the defendant owed no duty to display signs or warn of the danger of wires and poles erected over and on private property 26 feet above the ground which it had obtained a prescriptive right to maintain merely because of the presence of an airfield about 40 feet distant therefrom.

[2] Analyzing all of the above cases, it appears that lack of contractual relationship between a person injured by a power line or his employer and the owner of the power line is not the sole criterion in determining the measure of duty required of that owner. Even if, as contended by defendant, deceased in our case as to it was a trespasser, there is nothing inconsistent between the rule of the above cases and that of *Fernandez v. Consolidated Fisheries, Inc.*, 98 Cal.App.2d 91, 96, 219 P.2d 73, 77: "Thus, while there are many cases holding that a land owner is only required to refrain from inflicting wanton or wilful injuries on a trespasser or licensee, see many cases collected 19 Cal.Jur. p. 616, § 52, fn. 13, there are many cases also holding that after 'a trespasser is seen in a position of danger, due care must be exercised to avoid injuring him, and it is negligence not to do so.'" While the *Fernandez* case dealt with a situation of active rather than passive negligence, we can see no reason why the duty applied there should not apply to either type of negligence, namely, the "duty to exercise that degree of care a reasonably prudent man would have exercised under the circumstances." 98 Cal.App.2d at page 99, 219 P.2d at page 78.

[3] Under the circumstances of our case employees of the district were not

trespassers in the area over which defendant had an easement. It knew that the district had the right to use the surface of the ground, and of course it knew on Thursday not only that the district was actually using the area under its wires but had impaired the clearance to an extent which violated the rules of the Public Utilities Commission. Thus, its duty was to use reasonable care to avoid injuring the district's employees. "Even if at the outset of the installation of the equipment the company may have been entirely free from fault, yet, if, under changing circumstances, a hazardous condition arose, non-action or the failure to remedy such condition would constitute culpable negligence." *Lozano v. Pacific Gas & Electric Co.*, 70 Cal.App.2d 415, 422, 161 P.2d 74, 78.

(b) As a Matter of Law Did Defendant Fulfill Its Duty?

[4-6] Primarily, of course, the question of whether defendant used reasonable care towards deceased and the other employees of the district is a matter for the jury to determine. But if there is no evidence upon which a finding of lack of such care could be based, then, as a matter of law, defendant performed that duty. In determining this question we should bear in mind that the standard of care is "the care that a person of ordinary prudence would exercise *under the circumstances*. Among the circumstances are the well known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, *the care used must be commensurate with and proportionate to that danger.*" *Polk v. City of Los Angeles*, 26 Cal.2d 519, 525, 159 P.2d 931, 934. (Emphasis added.)

[7] We cannot say as a matter of law, in view of the highly dangerous electrical load carried by the wires and the evidence of activity in the area which defendant saw, that a delay in raising the clearance space from Thursday morning until after Friday afternoon and the occurring of the accident constituted care commensurate with and proportionate to the danger that existed. Nor can we say, as a matter of law, that the warnings given by defendant to the district people and the assurance given

en defendant that there would be no more dumping in that area justified defendant in that delay. In *Lozano v. Pacific Gas & Electric Co.*, supra, 70 Cal.App.2d 415, 161 P.2d 74, the court said that it was the *imperative duty* of a power company to use due diligence to discover and repair defects and dangerous conditions in their electrical instrumentalities and that failure so to do constitutes negligence. Whether defendant used due diligence in waiting over 24 hours to meet the dangerous situation disclosed here is a question of fact which should have been left to the jury to determine.

[8,9] Nor can we say as a matter of law that the sole proximate cause of Dunn's death was the negligence of Hickman in moving his truck with the body elevated under the wires. The presumption of due care applies to his acts. There is no evidence of the circumstances which brought him beneath the wires. It may have been due to momentary forgetfulness, to a sudden elevating of the body due to mechanical faults or many other causes which likewise would require the determination by the jury whether they were sole proximate causes or causes jointly with the negligence of defendant if defendant was negligent.

In *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, at page 216, 157 P.2d 372, at page 374, 158 A.L.R. 872, the court stated: "It is well settled that one test for determining the issue of negligence is whether a person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction." Having in mind that although the fill immediately under the wires had been completed, there was still more fill to be made in the nearby area, which required the use of trucks, and also "the qualities and habits of human beings * * *" *Mosley v. Arden Farms Co.*, supra, 26 Cal.2d at page 217, 157 P.2d at page 374, it was for the jury to determine whether a person of ordinary prudence, knowing what defendant knew, would have foreseen or anticipated that, in spite of the warnings given, the district's workmen might still drive trucks under the wires. "Where two independent actors are involved, whether the act of the person later in time breaks the chain of causation

and makes the act of the earlier person a remote cause, or whether both acts concurred in causing the injury, so that both are proximate causes, are normally questions for the trier of the fact where the act of the second person is reasonably foreseeable. It is a rare case where the court may hold, as a matter of law, that the intervening act breaks the chain of causation because whether it was reasonably foreseeable is a question of fact and not of law. The second act will break the chain of causation only where, under no rational interpretation of the evidence, could the later act of negligence have been reasonably foreseen." *Jones v. City of South San Francisco*, 96 Cal.App.2d 427, 435, 216 P.2d 25, 29.

Benard v. Vorlander, 87 Cal.App.2d 436, 197 P.2d 42, cited by defendant, is not in point. There although the power company installed the wires, it did not maintain or have control over them. Moreover, the court expressly stated that there was nothing in the evidence to show that the company knew or should have known of the proximity of the workmen to the lines. Again, *Sweatman v. Los Angeles Gas & Electric Corp.*, 101 Cal.App. 318, 281 P. 677, is not in point. There the wires were strung along the street, about 7 feet from and at the height of the fifth floor of the building in which the deceased was working. While moving a steel rod in and out of the windows of that floor, deceased caused it to come in contact with the wires. The case holds that the company could not have reasonably anticipated that anyone would make contact with its wires by means of a metal bar extended from a fifth story window of a building and that the law does not require one who "maintains even so dangerous an instrumentality as a highly charged electric wire to anticipate, at his peril, every possible fortuitous circumstance under which some person might make a contact with such wire * * *." 101 Cal.App. at page 322, 281 P. at page 678.

In *Jackson v. Utica Light & Power Co.*, 64 Cal.App.2d 885, 149 P.2d 748, the defendant maintained poles and high tension wires over an area that the division of highways chose for a relocation of a high-

way. There was no evidence that this area had ever been used by vehicles, agricultural equipment or machinery. The division notified the company that its poles and wires in this area would have to be moved, as construction would start at an early date. The company did nothing. Later, the construction work was started, and the company employees noticed the deceased who was an employee of the construction company operating a power shovel along the new right of way in the general vicinity of the accident and along the line of the power pole. An action was brought for the death of the shovel operator, caused by the shovel coming in contact with a telephone wire strung upon the same poles as the high tension wires. One of these wires had fallen on the telephone wire due to the breaking of a pole not immediately adjacent to the scene of the accident. The court held that from the time the company received notice of the proposed construction "it was * * * foreseeable that the poles and wires along the new right of way might be subjected to strains from vehicles and other equipment * * * [and] that, under the authorities cited above, the question of whether the negligence of the defendants was the proximate cause of the death of the deceased was a question of fact * * *" to be left to the determination of the jury, 64 Cal. App.2d at page 894, 149 P.2d at page 752. The authorities referred to stated, 64 Cal. App.2d at pages 891, 892, 149 P.2d at page 751: "The doctrine of 'proximate cause' or 'causal relation necessary to the existence of liability' is one which has presented some difficulty in its application to cases grounded upon negligence in which an act of the plaintiff or another has intervened in such manner that the intervening act may be said to be immediate cause of the resulting injury. There are many authorities holding that the intervention of such act does not necessarily prevent the negligence of the defendant from being the proximate cause of the resulting injury. * * * While the question of whether the negligence of a defendant may be held to be the proximate cause of the injury despite such intervening act is a question of law for the de-

termination of the court * * *, the foregoing authorities clearly indicate the question of whether the negligence of a defendant should be held to be the proximate cause of the injury is ordinarily a question of fact for the determination of the jury. * * * if the question of whether defendants' negligence is a 'substantial factor' is 'open to a reasonable difference of opinion', the question is one for the jury (sec. 434). And even in this state where the test seems to be based generally upon foreseeability, it has been said that a defendant may be liable even though 'it might not have foreseen the particular injury which did happen' * * * and that it is not necessary that defendant should have been able to anticipate the 'precise form of the consequential injury' * * *."

(c) Contributory Negligence.

In *Jackson v. Utica Light & Power Co.*, supra, 64 Cal.App.2d 885, 149 P.2d 748, it was held that where there were no eyewitnesses of the accident "the question of whether deceased was chargeable with negligence in bringing the power shovel in contact with the telephone wire was a question of fact for the jury and that in the determination of this question, plaintiffs were entitled to the benefit of the presumption that the deceased had used due care for his own safety and had not been guilty of negligence." 64 Cal.App.2d at page 895, 149 P.2d at page 753. Defendant contends that the evidence introduced by plaintiff destroyed the presumption of due care. See *Levin v. Brown*, 81 Cal.App.2d 913, 185 P.2d 329, and *Rogers v. Interstate Transit Co.*, 212 Cal. 36, 297 P. 884, to the effect that where the plaintiff's evidence is wholly irreconcilable with the presumption the latter is dispelled. As stated in *Graf v. Garcia*, 117 Cal.App.2d 792, 796, 256 P.2d 995, 997: "* * * where the question concerns the conduct of a person who is dead the presumption of the exercise of due care is operative unless the testimony of the witnesses produced by the party who would benefit by the presumption is 'wholly irreconcilable' with the presumption or 'only one reasonable conclusion (may) be drawn from the facts established by the testimony of'

such witnesses and '(t)hat conclusion was that the deceased in that action had been guilty of contributory negligence.' " Defendant's contention that the evidence is irreconcilable with the presumption is based on the fact that prior to the accident deceased well knew of the danger. For example, Collins testified that when he told Dunn to keep his bulldozer out from under the wires Dunn said, "Well, you don't think I'm going to get up under them * * *. You don't think I want to die?" But proof of knowledge of the danger alone is not irreconcilable with the presumption. If it were, the presumption could never be applied in railroad crossing cases because everyone knows there is danger at a railroad crossing. It only becomes irreconcilable if the evidence shows that the deceased *voluntarily* disregarded the danger. "Where a person is warned to keep away from a high voltage wire and not to touch it and is fully informed of the danger of so doing he is guilty of contributory negligence as a matter of law if he *voluntarily* contacts the wire." *Rojas v. Southern California Edison Co.*, supra, 105 Cal.App. 2d 258, 259, 233 P.2d 141, 142. (Emphasis added.) There is no evidence that Dunn *voluntarily* came in contact with the charged truck. In view of the presumption and in the absence of evidence that he did, we may assume that he did not, or that in momentary forgetfulness of the danger he might have been attempting to save Hickman after the latter had placed himself in a position of danger. "* * * where the negligence of a defendant has imperiled human life, a person who takes such steps as are reasonably necessary to rescue or protect those imperiled is not contributorily negligent in voluntarily leaving a place of safety and incurring danger if he does not act with a recklessness which would not be warranted, under the circumstances, in the judgment of a prudent man. * * * " * * * in such cases it is for the jury to say whether the plaintiff has acted with prudence under the circumstances or has conducted himself in so reckless a manner as to defeat the right of recovery.'" *Petersen v. Lang Transp. Co.*, 32 Cal.App.2d 462, 467, 90 P.2d 94, 97;

see also *McClure v. Southern Pacific Co.*, 41 Cal.App. 652, 183 P. 248.

[10] As the evidence is not "wholly irreconcilable" with the presumption, the question of contributory negligence is one of fact for the jury.

The judgment is reversed.

PETERS, P. J., and DOOLING, J., assigned, concur.



120 Cal.App.2d 722

HADEN v. HADEN.

Civ. 19650.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1953.

Action by wife against husband to have property settlement made in connection with Nevada divorce declared invalid. The Superior Court, Los Angeles County, David Coleman, J., entered judgment adverse to wife, and defendant appealed. The District Court of Appeal, Moore, P. J., held that, where wife appeared in Nevada court in which husband had brought divorce action against her on statutory grounds, technicalities and niceties concerning residence and service of summons disappeared, and Nevada court had jurisdiction to dispose of all issues according to law and evidence, including sufficiency of residential qualifications, in view of fact that both parties were before the Nevada court by proper pleadings.

Judgment affirmed.

I. Divorce ⇐ 327, 328

Where wife appeared in Nevada court in which husband had brought divorce action against her on statutory grounds, technicalities and niceties concerning residence and service of summons disappeared, and Nevada court had jurisdiction to dis-

pose of all issues according to law and evidence, including sufficiency of residential qualifications, in view of fact that both parties were before the Nevada court by proper pleadings.

2. Divorce ⚡328

Where wife, who was California resident, filed her general appearance in Nevada court, in which husband was maintaining divorce action, and waived service of summons, wife submitted to jurisdiction of Nevada court, and, therefore, divorce decree entered therein was entitled to full faith and credit, even though wife was not represented by counsel and did not participate in trial. Code Civ.Proc. § 1014.

3. Divorce ⚡160

An appearance and a failure to answer constitute an admission of truth of allegations of complaint in action for divorce. Code Civ.Proc. § 1014.

4. Judgment ⚡495(1)

A judgment presumes jurisdiction over subject matter and over persons involved.

5. Divorce ⚡327

It is only when defendant spouse has neither appeared nor been served in divorce action in another state that California court can re-open issue of domicile.

6. Husband and Wife ⚡278(1)

Even if husband, who had brought divorce action in Nevada, threatened to still get divorce or go away to Canada so that wife, who was California resident, would not see him any more unless wife executed property settlement, such threat did not constitute duress. Civ.Code, § 1569.

7. Husband and Wife ⚡278(1)

In proceeding by wife to have property settlement made in connection with Nevada divorce decree declared invalid, evidence was sufficient to sustain trial court's finding that property settlement agreement was fair, just, and equitable and not result of duress, or coercion.

8. Appeal and Error ⚡1010(1)

In action by wife to have property settlement made in connection with Nevada divorce decree declared invalid, where trial

court's finding that agreement was fair, just, equitable and not result of duress or coercion was supported by substantial evidence, finding could not be upset.

9. Husband and Wife ⚡278(1)

In action by wife to have property settlement made under Nevada divorce decree declared invalid, husband's testimony, which was not inherently improbable, should not be rejected.

J. H. Morris and Richard Morris, Hollywood, for appellant.

Tanner & Thornton, Los Angeles, by Francis D. Thornton, Los Angeles, for respondent.

MOORE, Presiding Justice.

The questions for decision are (1) whether the filing by a wife in a Nevada court of a waiver of service and a general appearance in an action brought by her husband for divorce is sufficient "participation" by her to validate the judgment; (2) whether duress arises out of a husband's telephonic conversation from Las Vegas to his wife in Los Angeles saying that "if I didn't sign the papers and send them, he would still get the divorce or he would go away to Canada and we wouldn't see him any more."

Appellant and respondent were married March 2, 1918. Their only son was born March 5, 1927. They separated March 5, 1943. On March 18, 1945, he journeyed from Los Angeles to Las Vegas, Nevada, where he remained until May 8, 1945. But on the last day of the preceding April, he sued for divorce and on May 7 appellant filed her general appearance and waiver of service of summons. Six days before he left Los Angeles, they executed a property settlement agreement whereby appellant was given title and possession of all community property. After their separation and prior to their agreement, they had many arguments concerning their property and a contract for the settlement thereof. Finally, when respondent proposed to her that one or the other of them go to Nevada and get a divorce, she accepted on condition that respondent would give her everything.

Such a settlement was made and the contract to effectuate it was prepared by attorney Bragin on the joint request of the parties although respondent had no previous acquaintance with such lawyer. Thereby appellant became sole owner of all the community estate which consisted of a home in Burbank, its furniture and furnishings and an automobile. Within a short time appellant sold her home and all the movables therein for \$4,000.

Promptly upon his return to Los Angeles on May 8, 1945, respondent married another woman. Concededly, he lost no time in forming the new alliance. He had worked until his departure from Los Angeles and returned to his same position on the last mentioned date. As a consequence, appellant now contends that (1) respondent's residence in Nevada was not in good faith and that he never gave up his residence in California; (2) by virtue of the nature of his sojourn in Nevada and by reason of her not participating in the Nevada trial, the court had no jurisdiction to grant a divorce; (3) the appearance and waiver were not freely executed by reason of coercion and threats and her not having advice of counsel; (4) the settlement was not freely and voluntarily made and was therefore not binding.

Residence in Nevada

[1] The argument that respondent did not reside for the requisite term in Nevada prior to his filing for divorce and did not have a sincere intention to abandon his California residence with the purpose of gaining such Nevada residence as would entitle him to sue for divorce is without support. Of course, if respondent had gone to Nevada for the sole purpose of obtaining a divorce on substituted service, he would have a problem. But before he left for Nevada he not only had a property settlement with appellant, but she promised to make an appearance in his action. That she actually did so is not disputed. Therefore, when he sued her on statutory grounds and she appeared in the Nevada court, the technicalities and niceties concerning residence and service of summons disappear.

When both parties are by proper pleadings in a Nevada court, it has jurisdiction to dispose of all the issues according to the law and the evidence. *Coe v. Coe*, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451. Under such circumstances the courts of Nevada or of any state have the sole right of determining the sufficiency of the residential qualifications of a litigant.

[2,3] Appellant contends that because she was not represented by counsel and no evidence was introduced on her behalf she did not participate in the Nevada trial and therefore the decree is not entitled to full faith and credit. Such is not the law. A defendant appears when he "gives the plaintiff written notice of his appearance" or answers or demurs. Code Civ.Proc., § 1014. When appellant filed her appearance, she thereby submitted to the jurisdiction of the court. *Sherrer v. Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 1097, 92 L.Ed. 1429; *Coe v. Coe*, supra; *In re Estate of Schomaker*, 93 Cal.App.2d 616, 209 P.2d 669; *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552. An appearance and a failure to answer constitutes an admission of the truth of the allegations of the complaint. *Marvin v. Marvin*, 46 Cal.App.2d 551, 554, 116 P.2d 151. Mrs. Sherrer of Massachusetts filed for divorce in Florida. Her husband retained a lawyer in the southern state who filed a general denial of all allegations of the complaint. Because the husband's counsel did not cross-examine or introduce any evidence, the decree was none the less valid and withstood attack by an independent action in Massachusetts. The court distinguished *Williams v. State of North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, where the decree was based upon a publication of service, whereas in *Sherrer v. Sherrer* the court made findings of requisite jurisdictional facts. "The defendant [there] appeared and participated." 334 U.S. at page 352, 68 S.Ct. at page 1090, 92 L.Ed. 1429. There was no inhibition against appellant's personal presence in the Nevada court. She had knowledge of the pendency of the action. She had sufficient funds to enable her to travel and to employ a lawyer right then. Instead of acting

with diligence she waited for six years after she had been divorced and until her son had attained the age of 25 years before coming into the consciousness that she had been defrauded. In the Estate of Schomaker, supra, it was held that in testing the validity of a Nevada decree of divorce, it is sufficient if the defendant in the Nevada court has participated in the proceedings and had full opportunity to litigate the issue. Mrs. Schomaker had an experience similar to that of appellant herein. While her husband was already in Nevada she settled with his attorney for all her interest in his property and was told by the lawyer that she could go to Nevada to oppose the divorce, but she said she did not wish to do so. She was told that it was best to submit to the jurisdiction of the Nevada court by going there or by appointing an attorney in fact to be served with summons. She knew the sale price of her husband's business was \$35,000. She did not have the benefit of independent legal advice as did not appellant herein, nor did she participate any more than by appointing the attorney to waive time and notice of trial. It was held that where the finding of the "requisite jurisdictional facts * * * in divorce proceedings in another state in which defendant appeared and participated and the decree has become final, it must be given full faith and credit in the courts of this state." [93 Cal.App.2d 616, 209 P.2d 673.] See *Daut v. Daut*, 98 Cal.App.2d 375, 220 P.2d 63. In the *Daut* case the defendant merely filed an appearance which conferred jurisdiction.

[4, 5] A judgment presumes jurisdiction over the subject matter and over the persons. It is only where the defendant spouse has neither appeared nor been served in the other state that the California court can reopen the issue of domicile. *Cook v. Cook*, 342 U.S. 126, 128, 72 S.Ct. 157, 96 L.Ed. 146, *Gromeko v. Gromeko*, 110 Cal.App.2d 117, 242 P.2d 41, *Staedler v. Staedler*, 6 N.J. 380, 78 A.2d 896, 28 A.L.R.2d 1291, and *Brasier v. Brasier*, 200 Okl. 689, 200 P.2d 427, are distinguished by the laws governing domiciliary residence or by

errors in court rulings on the admissibility of evidence.

No Duress

[6] Appellant contends the judgment should be reversed because she was compelled by duress to execute the property settlement and had no independent legal advice concerning it. His threat according to her own testimony was his telephonic statement from Nevada to her in Los Angeles that if she did not execute the property settlement agreement as he suggested, she would not see him any more. There is no law that such a threat constitutes duress. The only civil statute on the subject makes duress consist of unlawful confinement of a loved one or the unlawful detention of his property. Civ.Code, § 1569. Respondent did neither. While he was in Las Vegas, over five hundred miles away, appellant in Los Angeles signed the waiver and appearance. She had legal talent readily at hand to advise her. But instead of seeking guidance then, she waited six years to expend the fruits of the community property before charging she had been swindled by duress and a fraud had been committed on the court of Nevada.

Property Settlement Fair

[7-9] The court below heard the evidence submitted with respect to the conduct of respondent in making the contract with appellant. The testimony of Mr. Harden was that he did not threaten to leave for Canada if appellant would not sign the property settlement agreement; he did not tell her he would not contribute any money for the support of herself and the son, if she did not sign it. The court found and concluded that the agreement was fair, just and equitable and not the result of duress or coercion. Because it was supported by substantial evidence, it cannot be upset. Because the testimony of respondent was not inherently improbable, it should not have been rejected. *Pierce v. Pierce*, 61 Cal.App.2d 694, 700, 143 P.2d 948.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

120 Cal.App.2d 852

**CORNET STORES v. SECURITY TRUST &
SAVINGS BANK OF SAN DIEGO.**

Civ. 4818.

District Court of Appeal, Fourth District,
California.

Oct. 27, 1953.

Action against adjoining landowner to recover cost of constructing concrete wall on property line. The Superior Court of San Diego County, L. N. Turrentine, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that even though owner of building had been given notice under Civ.Code, § 832, of intention to make excavation on adjoining land and had taken no precautions to protect building against resulting damage, he was not liable for cost of concrete wall constructed on property line by owner of adjoining land to prevent building from falling onto such land and injuring persons and property.

Judgment affirmed.

1. Adjoining Landowners ⇨6

Owner of building was not liable for cost of concrete wall constructed on property line by owner of adjoining land to prevent building from falling onto such land and injuring persons and property as a result of proposed excavation on such land for basement purposes, though adjoining landowner had been given notice under statute of intention to make excavation and necessity to protect building against damage and had taken no precautions to protect building. Civ.Code, § 832.

2. Adjoining Landowners ⇨6

The purpose of Civil Code provision for giving notice of proposed excavation to adjoining landowner was to enable excavator to relieve himself from liability for resulting damage and not to create any liability in his favor against adjoining landowner. Civ.Code, § 832.

Stickney & Stickney and Edward Strop, San Diego, for respondent.

GRIFFIN, Justice.

This is an action for damages claimed to be due plaintiff under the provisions of Sec. 832 of the Civil Code, arising out of the excavation of a basement on plaintiff's property which adjoined defendant's property.

On January 5, 1951, plaintiff gave notice under sec. 832, supra, to the effect that it intended to make an excavation of 12 feet below the adjacent curb level on its property, for basement purposes; that the notice was given to afford the defendant a reasonable opportunity to protect its property from any damage caused by the excavation; that certain work would be necessary to prevent the defendant's building from falling onto the property of plaintiff and injuring persons and property; and that it was about to begin the construction of a building on plaintiff's property.

On defendant's property, and near the adjoining line, was located a building having a 30-inch foundation. Defendant took no action following this notice. Plaintiff made the excavation and constructed a concrete wall on the property line costing it \$4,153, and made demand on defendant for its cost, which defendant refused to pay. After trial by the court judgment was entered in favor of defendant and plaintiff appealed.

It now argues that where adjoining landowner is given notice, under Civil Code Sec. 832, of a proposed excavation, and thereafter fails to take any precautions to protect his property, the excavator may take such steps as are necessary to prevent the landowner's building from falling into the excavation and injuring persons and property, and recover the cost of such work from the adjoining landowner, citing *Eads v. Gains*, 58 Mo.App. 586; *Christensen v. Mann*, 187 Wis. 567, 204 N.W. 499, 501, 41 A.L.R. 1192; and cases discussed in 129 A.L.R. 629.

It is defendant's contention that the rule followed in *Eads v. Gains*, supra, is the

Roland Maxwell, Paul H. Marston, Pasadena, for appellant.

minority rule, as indicated in 129 A.L.R. 629. The holding in the Eads case was predicated upon an ordinance imposing a duty upon the adjoining property owner, after receiving notice, to underpin and protect his property, and from such breach of duty that court held the cost of shoring up the wall of such owner by the adjoining owner was recoverable. Defendant cites *First National Bank v. Villegra*, 92 Cal. 96, 28 P. 97, which is factually similar to the instant case and is predicated upon Sec. 832 of the Civil Code as it existed in 1891. There it was held that a coterminous owner of land who notifies the adjacent owner of his intention to excavate the land for purposes of building and who, upon the neglect of the adjacent owner to take any action to protect his property from the danger of excavation, expends money in support of the walls of a building on the adjacent land in order to prevent the building from falling in upon the excavated lot, expends such money for his own use and benefit, and cannot recover it from the adjacent owner. This same rule was applied in *Carty v. Blauth*, 169 Cal. 713, 147 P. 949. It cites several cases in California which hold that there was no duty imposed by the statute upon the property owner to safeguard his building from possible collapse, and stated that the effect of sec. 832, *supra*, then existing, had not materially changed the common-law rule. See, 1 Cal.Jur. p. 411, sec. 21.

Plaintiff also contends that since it alleged that the work performed was necessary to prevent injury to persons and property of plaintiff, the holding in the *Villegra* case may be distinguished. We see no merit to this contention. The statute does not specify any such exception or distinction.

In *Korogodsky v. Chimberoff*, 1930, 256 Ill.App. 255, the court said:

"If the owner of adjacent improved property does not see fit to protect himself and injury is sustained by him by reason of an excavation which is done with all reasonable care and skill, then he cannot recover, but the other person has no right to compel him to shore his

own property. The one making the improvement, has a common-law right to go upon the premises of the other for the purpose of shoring such building in order to protect property, when it is necessary, to prevent damage by reason of an excavation, but this is done at his own expense and cost. We are not in accord with the rule stated in the Missouri cases, but think the correct rule is found in the case of *First National Bank of San Francisco v. Villegra*, 92 Cal. 96, 28 P. 97."

The Missouri rule was also repudiated by the Minnesota Supreme Court in *Braun v. Hamack*, 1940, 206 Minn. 572, 289 N.W. 553, 129 A.L.R. 618.

The reporter for 129 A.L.R. at page 624, cites the *Villegra* case and cases from Illinois, Minnesota, Missouri, Montana, and New Jersey, as being in accord with the California courts, and states that they represent the holding of a majority of the courts.

In *Flanagan Bros. Mfg. Co. v. Levine*, 1910, 142 Mo.App. 242, 125 S.W. 1172, the court refused to adopt the rule in the Eads case. No city ordinance was there involved. The holding of a minority of the courts is supported by cases in Missouri, Connecticut and Illinois, although the *Korogodsky* case followed the majority rule.

[1,2] Section 832 of the Civil Code has been amended in many particulars since 1891, but we perceive no provision therein which would change the holding in the *Villegra* case. As stated in *Carty v. Blauth*, 169 Cal. 713, 147 P. 949, 951: "* * * the purpose of section 832, in its broadest scope, was to enable the excavator to relieve himself from liability; not to create any liability in his favor against his neighbor."

This being the judicial interpretation in this state of the effect of the section, any changes should be made by statutory law relating to the duties and liabilities of adjoining property owners, and not by this court.

Judgment affirmed.

BARNARD, P. J., concurs.

120 Cal.App.2d 727

GIACALONE v. INDUSTRIAL ACCIDENT COMMISSION.**Civ. 15836.**District Court of Appeal, First District,
Division 1, California.

Oct. 19, 1953.

Petition by widow of a decedent who was killed while working for and on ranch of a named person, to compel Industrial Accident Commission to substitute ranch owner's insurer in place of ranch owner in proceedings before the Commission, to dismiss ranch owner therefrom, and to restrain Commission from setting or holding any hearing contrary to an agreement between insurer and petitioner. The District Court of Appeal, Bray, J., held that proceeding before Industrial Accident Commission involving question of whether relationship between fatally injured workman and person for whom he was doing work was that of employee and employer or whether such workman was an independent contractor, could not be abated as matter of right because there was pending in Superior Court an action for death of such workman in which plaintiff claimed workman had been an independent contractor, since Industrial Commission and Superior Court had concurrent jurisdiction of subject matter and Superior Court had not exercised its jurisdiction.

Order in accordance with opinion.

I. Workmen's Compensation ⇨1191

An employer of injured employee is a "party in interest" within provision of Labor Code authorizing filing of application with Industrial Accident Commission by any party in interest, and employer of fatally injured employee was entitled to file application with Commission for determination of employer's liability with respect to death, notwithstanding Code provision authorizing dismissal of application which shows on its face that applicant is not entitled to workmen's compensation. Labor Code, §§ 3755, 5307(d), 5500, 5501, 5507; Const. art. 20, § 21.

See publication Words and Phrases, for other judicial constructions and definitions of "Party In Interest".

2. Workmen's Compensation ⇨1197

Statutory provision that if employer's insurer files notice of assumption of liability employer shall be relieved from liability for workmen's compensation to injured workman, and insurer shall, without further notice, be substituted in place of employer in proceeding and employer shall be dismissed therefrom, did not require dismissal of employer of fatally injured employee when insured filed assumption of liability notice in workmen's compensation proceedings, where there was a conflict in interest between alleged employer and insurer. Labor Code, §§ 3755, 5500; Insurance Code, § 11661.

3. Workmen's Compensation ⇨1197

Statutory provision that if employer's insurer files notice of assumption of liability employer shall be relieved from liability for workmen's compensation to insured workman, and insurer shall, without further notice, be substituted in place of employer in proceeding and employer shall be dismissed therefrom, is for employer's benefit as well as for insurer's benefit. Labor Code, § 3755.

4. Statutes ⇨206

Where possible every word in statute should be given effect in construing statute.

5. Statutes ⇨223.1

Statutes are to be construed to harmonize with one another.

6. Workmen's Compensation ⇨52

Workmen's Compensation Act is to be liberally construed in favor of jurisdiction of Industrial Accident Commission with purpose of extending benefits of Act for protection of persons injured in course of their employment, even though a plaintiff believes he can establish negligence on part of employer and brings a civil suit for damages. Labor Code, § 3202.

7. Workmen's Compensation ⇨2084

If injury to employee falls within scope of Workmen's Compensation Act, a

proceeding under such Act constitutes employee's exclusive remedy.

8. Master and Servant ⚡253½

Workmen's Compensation ⚡1199

If an injured employee is in doubt as to whether injury was sustained in course of his employment, he can protect himself against running of statute of limitations and be certain his claim will be heard in proper tribunal, by filing both a civil action in Superior Court and an application for compensation before Industrial Accident Commission.

9. Administrative Law and Procedure ⚡447 Courts ⚡39

Wherever court or board is authorized to act upon existence of certain state of facts it has jurisdiction to determine existence or nonexistence of requisite facts.

10. Courts ⚡475(1)

Where two tribunals have mutually exclusive jurisdiction, neither can be compelled to defer determination of that jurisdiction until the other has acted, but once the other has acted by actually determining and exercising its jurisdiction, that jurisdiction becomes exclusive.

11. Workmen's Compensation ⚡1169

Proceeding before Industrial Accident Commission involving question of whether relationship between fatally injured workman and person for whom he was doing work was that of employee and employer or whether such workman was an independent contractor, could not be abated as matter of right because there was pending in Superior Court an action for death of such workman in which plaintiff claimed workman had been an independent contractor, since Industrial Commission and Superior Court had concurrent jurisdiction of subject matter and Superior Court had not exercised its jurisdiction. Labor Code, § 3755.

12. Mandamus ⚡172

Generally facts as they exist when application for writ of mandamus is made determine right of petitioner and duty of respondent.

13. Mandamus ⚡14(3)

Mandamus is never granted to compel performance of an action until there has been an actual as distinguished from an anticipated refusal to act.

James F. Boccardo, San Jose, Edward J. Niland, Santa Clara, of counsel, for petitioner.

Leonard, Hanna & Brophy, San Francisco, for real party in interest, Wm. Battaglia.

Everett A. Corten, T. Groezinger, San Francisco, for respondent.

BRAY, Justice.

Petition by Jennie Giacalone, the widow of Antonio Giacalone, who was killed while working for and on the ranch of William Battaglia, to compel the Industrial Accident Commission to substitute Aetna Casualty & Surety Co. in place of Battaglia in certain proceedings before the commission, to dismiss Battaglia therefrom and to restrain the commission from setting or holding any hearing contrary to an agreement between Aetna and Jennie.

The controversy arises over Jennie's contention that Antonio was an independent contractor with, and not an employee of, Battaglia.

Questions Presented:

1. Is an employer such a party in interest that he may initiate and maintain a proceeding before the commission, independent of the employee, or his dependents, and the insurer?
2. Is section 3755, Labor Code, mandatory?
3. Which takes precedence, a court action first filed or a later proceeding before the commission?
4. Does mandate lie?

Record.

September 13, 1951, Jennie filed suit against Battaglia in the Santa Clara County Superior Court for damages for the death of Antonio, claiming that the relationship

between him and Battaglia was that of independent contractor. This suit is now at issue, and ready for trial. July 7, 1952, Jennie filed with the commission an application for compensation for Antonio's death, alleging the relationship between him and Battaglia to be that of employee and employer. This proceeding was filed to prevent the statute of limitations from running before the civil action could be tried. Jennie claims that she then entered into an agreement with Aetna to the effect that the latter would pay funeral costs and death benefits if the commission ever determined that Antonio was an employee of Battaglia, and that her application might be dismissed without prejudice to being refiled, if she so desired, after the determination of the court action. February 3, 1953, Battaglia filed with the commission an application for adjustment of claim. The commission gave this the same file number as that of Jennie's application. Battaglia alleged that he was the employer, Aetna was his insurer and Antonio was his employee, and asked for "a determination of my liability with respect to the death of Antonio Giacalone." On March 27, 1953, Aetna, pursuant to section 3755 of the Labor Code, filed with the commission a notice of assumption of liability, in which it assumed and agreed to pay "any compensation to the claimant for which the employer is liable." It also filed a motion to be substituted for Battaglia both as a party defendant under Jennie's application and a party applicant under the Battaglia application. It also moved to dismiss Battaglia from Jennie's proceeding. Thereupon Jennie requested that her application be dismissed without prejudice. Battaglia answered Aetna's notice of substitution alleging that he had a right to remain in the proceedings and asked that the notice of assumption of liability be considered merely a stipulation of coverage. On April 7th the commission dismissed Jennie's application. Since that time, Battaglia has been trying to get his application heard, to which both Jennie and Aetna have objected, and Aetna has been trying to get its motions heard. The commission has not spe-

cifically set Aetna's motions for hearing but has set and reset general hearings headed under both the Battaglia and Jennie applications (although the latter was dismissed). It has even started hearings at which no evidence was introduced. Jennie and Aetna have stipulated that the Battaglia application may be removed from the calendar until further action by Jennie. Petitioner claims that the commission has disregarded the agreement to postpone proceedings and intends to proceed. A hearing had been set at the time this petition was filed but has not been held.

1. Is the Employer a Party in Interest?

Section 5500 of the Labor Code: "The application shall be in writing and shall state the general nature of *any controversy* concerning compensation or *any right or liability* arising out of or incidental thereto * * *." ¹ Section 5501: "The application may be filed with the commission by *any party in interest* * * *." In *Merino v. Pacific Coast Borax Co.*, 124 Cal.App. 336, 12 P.2d 458, Merino had contracted with the company to sack clay. Merino employed one de la Mora to do some of the work. While so employed de la Mora was killed by the collapse of a tank under which he was working. One of his dependents filed with the commission an application for an adjustment of claim for compensation for the death of de la Mora. The company and its insurance carrier were named defendants. Thereafter, at the instance of the company, Merino was made a defendant in the proceeding. The commission made an award to de la Mora's dependent against Merino only. Merino then sued the company for the amount he had been ordered to pay the dependent under the commission's award, on the theory that the accident was due to the company's negligence. In discussing the effect of the proceedings before the commission in which the company had been made a defendant, the court held that the company was "an interested party in the proceeding." 124 Cal.App. at page 341, 12 P.2d at page 460. It will be observed that this is a holding that one

1. Unless otherwise noted, emphasis herein is ours.

contracting with an employer of labor is a party in interest in the proceeding brought by the dependent of an injured employee of that employer in the commission to obtain an award for compensation resulting from the death of the employee. Logically, if the contractor is a party in interest in such a proceeding, much more so is the employer. While the exact question of whether an employer is such a party has never been determined in California, this decision is well-nigh determinative.

A near approach to a consideration of the subject appears in *Industrial Indem. Exch. v. Industrial Accident Comm.*, 26 Cal.2d 130, at page 138, 156 P.2d 926, at page 930, where the court stated: "Petitioner also challenges the jurisdiction of the commission to make the award in this case on the ground that the proceedings before it were initiated by the general employer without the consent and against the wishes of the injured employee. While the commission's power to make an award in such circumstances would appear to find support in *Independence Indem. Co. v. Industrial Accident Comm.*, 2 Cal.2d 397, 41 P.2d 320, we do not find it necessary to determine that question in this case." The reason given was that the employee filed an answer requesting relief to the general employer's application. The court then said that there could be no doubt of the propriety of the joinder of the special employer and its insurance carrier on the application of the special employer who had filed the proceeding, pointing out that section 5307 of the Labor Code provided for such joinder.

In *Northwestern Redwood Co. v. Industrial Accident Comm.*, 184 Cal. 484, 194 P. 31, in holding that a wife is a party in interest and may apply to the commission for an award for the injury of her husband, the court said: "The statute expressly authorizes the application by any party in interest." 184 Cal. at page 486, 194 P. at page 32. In *Independence Indem. Co. v. Industrial Accident Comm.*, 2 Cal.2d 397, 41 P.2d 320, in upholding the right of a doctor who treated an injured employee to bring a proceeding in the commission for his services, the

court pointed out that the then section 57 of the Workmen's Compensation Act (now Labor Code, § 5307(d) provided for the " * * * joinder in the same proceeding of all persons interested therein, whether as employer, insurance carrier, employee, dependent, creditor or otherwise." 2 Cal.2d at page 407, 41 P.2d at page 325. The court also stated, 2 Cal.2d at page 408, 41 P.2d at page 325: "It is a fairly common practice for proceedings to be initiated by an employer or insurance carrier, and certainly even under a narrow construction of section 17 (a) of the act, * * * they are parties in interest entitled to do so."

[1] The legislative history of sections 5500 and 5501 sheds some light on the subject. The contents of these sections plus that of 5502, which relates to the time of hearing the application, were comprised in the first sentence of section 17(a) of the Workmen's Compensation Insurance and Safety Act of 1917. It provided in effect that the application could be filed by "any party in interest" and should state the general nature of any dispute or controversy concerning compensation or any right or liability arising out of, or incidental thereto, and provided for the fixing of the hearing of the application. While it now takes three sections to express what was there expressed in one sentence, the reference still is to an application by "any party in interest". Obviously an employer has a real interest in having a determination as to whether an injured person was his employee or an independent contractor. The employer, unless he qualifies as a self-insurer, is required to have compensation insurance. He is not compelled to, and may not have, liability coverage. He is interested in having a quick determination of the status of the injured person and of whether his compensation carrier is to take care of him, or whether his liability is one for which the carrier is not responsible. Certainly, in the words of section 5500, he is interested in a "controversy concerning compensation" and a "liability arising out of or incidental thereto".

An employer has a real interest in the application of the act, for it relieves him of civil liability, attendant costs and large jury verdicts. In *Mountain Timber Co. v. State of Washington*, 243 U.S. 219, at page 234, 37 S.Ct. 260, at page 263, 61 L. Ed. 685, the court, referring to the Washington Workmen's Compensation Act, said: "* * * It is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him * * *." (Emphasis not added.)

Petitioner contends that even conceding that the employer is a party in interest, the provisions of the Labor Code show that it was never contemplated that a proceeding might be brought or maintained by the employer over the employee's objection. She points out that section 5507 provides that "If an application shows upon its face that *the applicant is not entitled to compensation*" the commission may, after the applicant has an opportunity to submit his "claim," dismiss the application and contends that the applicant must be one entitled to compensation or having a claim, as to neither of which an employer qualifies.

In *Metropolitan Casualty Ins. Co. v. Maloney*, 56 Ga.App. 74, 192 S.E. 320, the court was construing the Georgia Workmen's Compensation Act. It provided that where an employer and an injured employee failed to reach an agreement in regard to compensation under the act, either one might apply to the Department of Industrial Relations for a hearing. One section barred the right to compensation unless a "claim" was filed within one year. The employer filed a proceeding to have his liability determined. The injured employee filed an answer. It was contended that this answer did not constitute a "claim" and that as the year had expired, the commission had no jurisdiction to make an award to the employee. The court held that the word "claim" in the statute was coextensive with "case" and that the "case" or "claim" of both employer and employee were filed in time.

We do not believe that the Legislature intended by this language to bar the right of a party in interest to file his application to have his "liability" determined, a right given in preceding sections. Particularly is this so when we consider section 21, article XX of the Constitution (the section giving the Legislature plenary power to set up the workmen's compensation system) which provides that the administrative body which the Legislature might set up (the Industrial Accident Commission) should have full authority to "determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases *expeditiously, inexpensively, and without incumbrance of any character * * **" An employer, then, having the right to initiate a proceeding, it logically follows that he must necessarily have the right to maintain it. But, says petitioner, section 3755 denies him that right.

2. Is Section 3755 Mandatory?

It provides that if the employer's insurer files the notice of assumption of liability as there provided, the employer shall be relieved from liability for compensation to the injured workman and "The insurer shall, without further notice, be substituted in place of the employer" in the proceeding "and the employer shall be dismissed therefrom." In determining the effect of the word "shall" in this section it is well to regard its legislative history. Sections 30 and 31 of the Workmen's Compensation and Safety Act of 1917 were not concerned with the subject of procedure before the commission but dealt primarily with the subject of insurance. When the Labor Code was adopted section 30(a) and a part of 30(b) were incorporated into Labor Code, sections 3750-3754. The remaining portion of section 30(b), all of subdivisions (c) and (d) and section 31 dealing with limitations in the insurance policy and providing that the employer may not insure against liability for misconduct were incorporated in section 11650 et seq. of the Insurance Code. Section 30(e)

which included the provision for substitution of the insurer and dismissal of the employer was broken up and incorporated into sections 3755-3759 of the Labor Code. An examination of section 30(e) clearly demonstrates that it was dealing primarily with a simplified method of carrying into effect without delay the provisions of the insurance policy which section 30(c) (now Ins. Code, § 11651) and section 30(d) (now Ins. Code, § 11656) require to be inserted in every compensation policy to the effect that the insurer will be liable directly to the employee and that the employee shall have a first lien on the amount due the employer under the policy. When the section was codified no changes in substance were made. Section 2, Labor Code, provides that under such circumstances the provisions shall be construed as restatements and continuations of the old and not as new enactments.

[2] That section 3755 was never intended to be mandatory under all conditions is well illustrated by the situation when the employee claims he was injured through the wilful misconduct of the employer. Section 31(b) (now Ins. Code, § 11661) provides that insurers may not insure the employer against liability for wilful misconduct. Certainly if under section 3755 the insurer files a notice of assumption of liability to the full extent of its policy, the issue of wilful misconduct would still be in the proceeding and the insurer could not be substituted for the employer. There is nothing in the section nor the act which forces the construction that where there is a conflict in interest between the employer and the insurer the employer must be dismissed. There may be such a conflict here. It would be to the insurer's interest to join with the widow to delay this proceeding in which the insurer is supposed to take the laboring oar for his insured until the trial of the civil action in which the insurer has no interest and in which the insured has the laboring oar. Moreover, it would be to the insurer's interest to join with the widow in an endeavor to prove her husband's status as that of an independent contractor. In *Employers' Lia-*

bility Assur. Corp. v. Industrial Accident Comm., 177 Cal. 771, 171 P. 935, 936, it was held that the Workmen's Compensation Act provides "A scheme of insurance for the protection *both* of the employer and the employee * * *." To permit that scheme to place the employer in a position where he might be at the mercy of his insurer, would not only be unjust but could only be accomplished by an interpretation contrary to the spirit of the Constitution and the act, by requiring a strict rather than a liberal interpretation of its provisions.

[3] It is obvious that section 3755 is for the employer's benefit, as well as that of the insurer. Actually, in removing the employer from the proceeding, it deprives the employee of the right to a judgment against both the employer and the insurer, in spite of the fact that the policy must provide that the insurer is directly and primarily liable to the claimant, Ins. Code, § 11651, and that the claimant has a first lien thereunder. Ins. Code, § 11656. In *Weiser v. Industrial Accident Comm.*, 172 Cal. 538, 157 P. 593, it was held that where an employer is properly insured at the time of the accident he is entitled to be relieved from liability to the employee for compensation, even though his insurance carrier subsequent to the injury to the employee is deprived of the right to transact further business in this state. Certainly such a situation does not benefit the employee.

[4, 5] In construing section 3755 with section 5500, two rules of construction, among others, should be kept in mind: (a) The rule that where possible every word should be given effect. The word "liability" in section 5500 can apparently only be given effect by holding that the employer has a right to have his "liability" determined. (b) The rule that statutes are to be construed to harmonize with one another.

Respondent contends that the dismissal portion of section 3755 by its terms does not apply to a proceeding initiated by the employer. The first part of the section states that if the notice of assumption of liability is served upon "any compensation

claimant" the employer shall be relieved from liability to the claimant. But, the substitution of the insurer for the employer and the dismissal of the latter is only "*in any proceeding theretofore or thereafter instituted by such claimant to recover such compensation * * **" The proceeding in the commission carries the same number as that given Jennie's application. Section 5303 of the Labor Code provides: "There is but one cause of action for each injury coming within the provisions" of the Workmen's Compensation Act. "All claims brought * * *, or any other matter arising out of such injury may, in the discretion of the commission, be joined in the same proceeding at any time." While there may be merit in respondent's contention, we prefer to hold that the section never contemplated that where there developed a conflict of interest between the employer and the insured, the former could be dismissed from the proceedings. Thus, the statement in section 15 of the Labor Code that the word "shall" is mandatory does not apply. See *In re Estate of Mitchell*, 20 Cal.2d 48, 51, 123 P.2d 503, 504, quoting from *In re Chadbourne*, 15 Cal.App. 363, 114 P. 1012: "'We must assume that the Legislature had before it this policy of the law when it enacted the statute in controversy. And, while the language upon its face seems to be mandatory, the cardinal canon of interpretation requires, of course, that we give effect to the intention of the lawmakers, though it may seem opposed to the letter of the statute,' * * *."

3. Precedence of Court Action.

[6-8] Petitioner and amicus curiae in the companion case contend that the court action having been filed first requires an abatement or at least a stay of the proceeding in the commission. In *Freire v. Matson Navigation Co.*, 19 Cal.2d 8, at page 10, 118 P.2d 809, the court said: "The Workmen's Compensation Act is to be liberally construed in favor of jurisdiction in the commission with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment * * *. Labor

Code sec. 3202 * * *; *Fenton v. Industrial Accident Comm.*, 44 Cal.App.2d [379, 382], 112 P.2d 763. The rule is not altered because a plaintiff believes that he can establish negligence on the part of his employer and brings a civil suit for damages. If the injury falls within the scope of the act, a proceeding thereunder constitutes his exclusive remedy. Labor Code, sec. 3601 * * *; see cases cited in 27 Cal.Jur. 262, and 12 Cal.Jur. Ten Year Supp. 4-5. If an employee is in doubt whether or not his injury is sustained in the course of his employment, he can protect himself against the running of the statute of limitations, and be certain that his claim will be heard in the proper tribunal, by filing both a civil action in the superior court and an application for compensation before the commission. *Schumacker v. Industrial Accident Comm.*, 46 Cal.App.2d [95], 115 P.2d 571." The question before this court in the *Schumacker* case, 46 Cal.App.2d 95, 115 P.2d 571, was whether a judgment rendered in an action filed in the superior court before a proceeding filed in the Industrial Accident Commission and in which judgment was rendered before the proceeding was heard, was res judicata as to whether the deceased workman had been engaged in interstate or intrastate commerce. In holding that the issue was not raised in the superior court and therefore the judgment could not be res judicata on that subject, this court apparently assumed that had the issue been raised the judgment would have been res judicata, but whether because the action was first filed or first tried does not appear. In *Williams v. Southern Pac. Co.*, 54 Cal. App. 571, 202 P. 356, a widow sued her husband's employer under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., for the death of her husband, alleging that he was engaged in interstate commerce. Later she filed a claim with the Industrial Accident Commission alleging that in the court action the employer claimed the husband was engaged in intrastate commerce and asked that the proceeding be held in abeyance until the determination of the court action. When the commission refused to postpone ac-

tion, the widow applied to the Supreme Court for a writ of prohibition to restrain the commission from proceeding. The application was denied. Thereupon the commission proceeded to make her an award. Later, she was awarded a judgment in the court action. On appeal in the latter action the employer contended that since the superior court first acquired jurisdiction, its determination of any issue before it was conclusive notwithstanding a prior inconsistent determination of the same issue by the commission. "It is not claimed that either the action in the superior court or the proceeding before the Commission could have been successfully pleaded in abatement of the prosecution of the other, but respondent cites 15 Corpus Juris, 1161, to the effect that where two tribunals have concurrent jurisdiction over the same parties and subject-matter, 'the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case.' At page 1165 of the same volume, however, it is stated that—'the rule is limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly *in personam*, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction.' There is some confusion in the decisions because of failure to recognize the limitation just stated. In strictly personal actions the great weight of authority sustains the rule as stated in the case of *Boatmen's Bank [of St. Louis, Mo.] v. Fritzlen*, [8 Cir.], 135 F. [650] 667, 68 C.C. A. 288, that—"it is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, that renders the issues in such a case *res adjudicata* in the other court. [Citing a long line of authorities in other jurisdictions.]" 54 Cal.App. at pages 575-576, 202 P. at page 358; emphasis not added. The court then held, 54 Cal.App. at page 580, 202 P. at page 360: "Having recovered judgment for compensation in the proceeding before the commission by establishing the fact

that the deceased was employed in intrastate commerce, and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based."

In *Goodman Bros. v. Superior Court*, 51 Cal.App.2d 297, 124 P.2d 644, the commission had granted an injured employee an award against Goodman Bros. whom it found to be the employer and to be insured. The proceeding in the commission had been filed before a superior court action was filed by the employee against Goodman Bros. in which the employee alleged that his employer was not insured. After the commission made its award Goodman Bros. filed an answer in the court action setting up the commission's award as *res judicata* of the insurance issue. The court sustained a demurrer to this answer and struck out the plea of *res judicata*. Goodman Bros. then applied to this court for a writ of prohibition to restrain the court from proceeding with the action, on the ground that the commission's award was *res judicata*, and the court was thereby deprived of jurisdiction. We held that the award of the commission was *res judicata* of the question of insurance and approved the statement in *Williams v. Southern Pac. Co.*, *supra*, to the effect that as between a civil action and an Industrial Accident Commission proceeding it is the first final judgment that counts, regardless of which action or proceeding was first started.

In *Robbins v. Yellow Cab Co.*, 85 Cal.App. 2d 811, 193 P.2d 956, it was held that the jurisdiction to determine whether an employee when injured was acting within the scope of her employment was not exclusive in the commission, but that the court in which she had filed a suit contending that she was not so acting had jurisdiction to determine the issue. No proceeding was then pending in the commission. See also *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729.

While the *Williams* and *Goodman* cases were dealing with the question of *res judicata* judgments, there can be no question that they were determining, in effect, that the courts and the commission have concur-

rent jurisdiction to determine the status of a workman as to whether he is an employee or an independent contractor, and that pendency of such question in either tribunal cannot require an abatement in the other. There is nothing in the cases cited by petitioner that is contrary to this rule. *Browne v. Superior Court*, 16 Cal.2d 593, at page 597, 107 P.2d 1, at page 3, 131 A.L.R. 276, recognized it, saying: "This is the familiar proposition that where several courts have concurrent jurisdiction over a certain type of proceeding, the first one to assume *and exercise* such jurisdiction in a particular case acquires an exclusive jurisdiction." *Myers v. Superior Court*, 75 Cal.App.2d 925, 172 P.2d 84, dealt with actions to quiet title to real and personal property which dealt with specific property and as stated in the quotations from 15 C.J. 1161 and 1165, 21 C. J.S., Courts, § 529, set forth in *Williams v. Southern Pac. Co.*, supra, 54 Cal.App. 571, 575, 202 P. 356, come under a different rule than actions in personam. *Lee v. Superior Court*, 191 Cal. 46, 214 P. 972, was a case in which the commission appointed a guardian of certain minors to receive the award made to such minors before the superior court in an action later filed also appointed a guardian of the estate of said minors, which consisted merely of the claim for compensation. While the court in holding that the superior court had no jurisdiction to appoint the guardian used language to the effect that the *commencement* of such a proceeding in either tribunal would oust the jurisdiction of the other in a proceeding later filed, the principle applied was the one above mentioned, that where there is concurrent jurisdiction, prohibition will lie to restrain a tribunal from acting where the other has assumed *and is exercising* its jurisdiction over the same matter. 191 Cal. at page 49, 214 P. 972.

[9,10] "Wherever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or non-existence of the requisite facts." *Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 380, 385, 160 P. 228, 230. Necessarily, then, when, as here, two tribunals have mutually

exclusive jurisdiction, neither can be compelled to defer determination of that jurisdiction until the other has acted. But once the other has acted by actually determining and exercising its jurisdiction, that jurisdiction becomes exclusive.

[11] As the superior court has not exercised its jurisdiction and the commission has concurrent jurisdiction of the subject matter, the proceeding before it cannot be abated as a matter of right.

Petitioner contends that if the proceeding cannot be abated as a matter of right, the writ of mandate should issue to restrain the commission from proceeding because, under the circumstances, particularly because of the agreement between the widow and the insurer that the proceeding be abated, the commission abused its discretion in denying the abatement or stay.

4. Will Mandate Lie Otherwise?

[12,13] In determining whether we might hold that the commission abused its discretion in refusing to grant a discretionary stay, we are faced with the situation that the commission has not refused to exercise its discretionary right. Apparently the agreement or stipulation between the widow and the insurer was never brought to the attention of the commission. It was not filed there until the same day Jennie's application for a writ was filed in this court. "It is the general rule that the facts as they exist at the time the application for the writ of *mandamus* is made determine the right of the petitioner and the duty of the respondent." *Christ v. Superior Court*, 211 Cal. 593, 600, 296 P. 612, 615. The commission has never denied a discretionary stay. It has set a general hearing. Presumably, the first matter to be considered by it at such hearing would be petitioner's request for a stay. Until, with the evidence before it which petitioner claims requires the exercise of its discretion, the commission acts, there is nothing for us to review. " * * * mandamus is never granted to compel the performance of an act until there has been an actual as distinguished from an anticipated refusal. * * *" *George v. Beaty*, 85 Cal.App. 525, 531, 260 P. 386, 388. We, of

course, are expressing no opinion on the effect of an agreement signed by only two of the parties to the proceeding nor on whether the commission should or should not, as a matter of discretion, stay the proceeding.

The alternative writ is discharged and the petition for a peremptory writ is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.



120 Cal.App.2d 905

AETNA CASUALTY & SURETY COMPANY,
Petitioner, v. **INDUSTRIAL ACCIDENT**
COMMISSION of the State of California
and **William Battaglia, Respondents.**

Civ. 15845.

District Court of Appeal, First District,
Division 1, California.
Oct. 19, 1953.

Keith, Creede & Sedgwick, San Francisco, for petitioner.

Everett A. Corten, T. Groezinger, San Francisco, for respondents.

Donald Gallagher, Allan Sapiro, San Francisco, for State Compensation Insurance Fund, amici curiae.

BRAY, Justice.

Petition for writ of mandate by Aetna Casualty & Surety Co. to compel the Industrial Accident Commission to substitute Aetna in place of William Battaglia in certain proceedings before the commission, to dismiss Battaglia therefrom and to restrain the commission from setting or holding any hearing contrary to an agreement between Aetna and Jennie Giacalone. The State Compensation Insurance Fund appears as amicus curiae in support of petitioner's position.

The facts, contentions and the relief requested are identical with those set forth

in *Giacalone v. Industrial Accident Commission*, Cal.App., 262 P.2d 79.

On the authority of that decision, it is ordered that the alternative writ be discharged and the petition for a peremptory writ of mandate be denied.

PETERS, P. J., and FRED B. WOOD, J., concur.



120 Cal.App.2d 825

PEOPLE v. BATWIN.

Cr. 5002.

District Court of Appeal, Second District,
Division 3, California.
Oct. 26, 1953.

Defendant was convicted of unlawful possession of marijuana. The Superior Court, Los Angeles County, John J. Ford, J., entered judgment, and defendant appealed therefrom, and from order denying motion for new trial. The District Court of Appeal, Vallée, J., held that evidence supported inference that defendant knew that marijuana was in house which he occupied and that he had physical control of it with intent to exercise such control, and sustained conviction.

Judgment and order affirmed.

1. *Polsons* ⇨4

Possession of a narcotic is established when it is shown that a person has physical control thereof with intent to exercise such control, or having had such physical control, has not abandoned it, and no other person has that possession.

2. *Polsons* ⇨4

Knowledge of the facts is an essential element of offense of unlawful possession of a narcotic, and prosecution must establish that defendant had knowledge of presence of the article and that it was a narcotic.

3. Poisons ☞9

In prosecution for unlawful possession of a narcotic, essential facts may be shown by circumstantial evidence and reasonable inferences that may be drawn therefrom.

4. Poisons ☞9

In prosecution for unlawful possession of marijuana, evidence supported inference that defendant knew that marijuana was in house he occupied and that he had physical control of it with intent to exercise such control, and sustained conviction.

5. Criminal Law ☞742(1)

In prosecution for unlawful possession of marijuana, credibility of defendant and his wife was for trier of facts.

6. Criminal Law ☞1202(3)

Testimony of defendant on cross-examination that he had been convicted of robbery was not proof of allegation of information with respect to prior conviction, but was available to prosecution for purpose of impeachment only.

7. Criminal Law ☞1177

Where prosecution offered no proof of charge of prior conviction contained in information charging, principally, unlawful possession of marijuana, and court pronounced judgment on charge of prior conviction, finding that such conviction had been proved when defendant, on cross-examination, admitted conviction, but court subsequently modified judgment by striking any reference to prior conviction, and imposed sentence for the principal offense only, error, if any, was in defendant's favor, and was not ground for reversal.

8. Criminal Law ☞1165(3)

A judgment will not be reversed for error which is favorable to appellant.

G. Vernon Brumbaugh, Los Angeles, and Robert P. Dockeray, Burbank, for appellant.

Edmund G. Brown, Atty. Gen., and Alan R. Woodard, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of unlawfully having marijuana in his possession. He

appeals from the judgment and the order denying his motion for a new trial. The marijuana was found in the home of defendant and his wife. Defendant asserts that possession was not established in that there was no evidence he had any knowledge of the presence of the marijuana in the house or that he had any control over it.

On October 8, 1952, several police officers had defendant under observation at his residence in Los Angeles. On three occasions defendant left the house, went out into the street and returned into the house. On the third occasion, one of the officers approached him and called him by his first name. Defendant ran for the door of the house and slammed it in the face of the officers. The officers then forced entry into the house. Defendant and his wife were there. Defendant was standing nearer the hallway leading into the bathroom than was his wife. On entering, one of the officers heard the sound of rushing water. He went into the bathroom, saw water moving in the toilet bowl and marijuana floating on the surface of the water and around the bowl. He also found a jar with 100 milligrams of marijuana on the wash basin. The officers found several packages of wheatstraw cigarette papers in a drawer of a closet in the bedroom.

Defendant's wife testified: She heard a banging and pounding on the front door and somebody said it was the police; she ran to the bedroom, got a jar of marijuana and started throwing it down the toilet and spilled some; the jar was kept in a drawer in a wardrobe closet; she had not at any time told defendant she had the jar; she had concealed it from him; she kept the marijuana for her own use and smoked it; she had had it a few days; she was not selling it; this was the first time she had used it; she was pregnant and somebody told her it would help her sleep; she did not say anything to the officers about the marijuana belonging to her at the time they arrested defendant. Defendant testified: When the officers were banging on the door he told his wife it was the police; in the house one of the officers asked him if the marijuana was his and he told him it was

not. He denied having any knowledge of the presence of marijuana in the house and of his wife's using it. He also denied that he saw any of the officers outside of the house.

[1-3] Possession of a narcotic is established when it is shown that a person has physical control thereof with the intent to exercise such control, or having had such physical control has not abandoned it, and no other person has that possession. *People v. Shepherd*, 118 Cal.App.2d 346, 257 P.2d 992. Knowledge of the facts is an essential element of the offense of the possession of a narcotic. The prosecution must establish that the defendant had knowledge of the presence of the article and that it was marijuana. *People v. Gory*, 28 Cal.2d 450, 456, 170 P.2d 433; *People v. Cole*, 113 Cal.App.2d 253, 258, 248 P.2d 141. The essential facts may be shown by circumstantial evidence and reasonable inferences that may be drawn therefrom.

[4,5] The marijuana was in defendant's home in a readily accessible place. A large number of cigarette papers were there. When defendant was called by his first name, he ran into the house and slammed the door in the face of the officers. When the officers entered the house, he was standing nearer the bathroom than his wife. A reasonable inference from defendant's occupancy of the premises and the other circumstances shown by the evidence is that defendant knew that the marijuana was in the house and that he had physical control of it with the intent to exercise such control. *People v. Salo*, 73 Cal.App.2d 685, 167 P.2d 269; *People v. Brown*, 92 Cal.App.2d 360, 206 P.2d 1095. This satisfies the statute. *People v. Monge*, 109 Cal. App.2d 141, 240 P.2d 432. The trial judge stated he was satisfied defendant and his wife were not telling the truth. He did not

have to believe their testimony. *People v. Mitchell*, 91 Cal.App.2d 214, 219, 205 P.2d 101; *People v. Klinkenberg*, 90 Cal.App.2d 608, 626, 204 P.2d 47, 613.

[6-8] In addition to the charge of possession of marijuana, defendant was charged with a prior conviction of robbery, which he denied. The prosecution offered no proof of this charge. On cross-examination, defendant was asked if he had been convicted of robbery in Los Angeles County on November 8, 1950. He replied that he had been. No other evidence of the alleged prior conviction was produced. The court found it was true that defendant had been convicted of robbery. Before judgment was pronounced, defendant moved for a new trial. The motion was denied and judgment pronounced on the charges of possession and the prior conviction. Later the same day and before the judgment had been entered by the clerk, the court modified the judgment by striking any reference to the prior conviction *nunc pro tunc* as of the time of the arraignment for sentence. The sentence imposed was thus for possession of marijuana only. Defendant asserts the court erred in striking the reference to the prior conviction from the judgment. The testimony of defendant on cross-examination that he had been convicted of robbery was not proof of the allegation of the information with respect to the prior conviction. It was available to the prosecution for the purpose of impeachment only. *People v. Carrow*, 207 Cal. 366, 368, 278 P. 857. The error, if any, was in defendant's favor. A judgment will not be reversed for error which is favorable to the defendant. 4 Cal.Jur.2d 502, sec. 620.

The judgment and order appealed from are affirmed.

SHINN, P. J., and WOOD, J., concur.

120 Cal.App.2d 770

**JONES v. CALIFORNIA EMPLOYMENT
STABILIZATION COMMISSION et al.**

Civ. 19407.

District Court of Appeal, Second District,
Division 2, California.

Oct. 23, 1953.

Hearing Denied Dec. 17, 1953.

Petition for writ of mandamus to set aside decision of Unemployment Insurance Appeals Board that petitioner was ineligible for unemployment compensation benefits for two days following termination of his employment because of lack of work. From an adverse judgment of the Superior Court of Los Angeles County, Frank G. Swain, J., plaintiff appealed. The District Court of Appeal, Fox, J., held that during period for which plaintiff was entitled to pro rata vacation pay under collective bargaining agreement, he was not unemployed within meaning of Unemployment Insurance Act, General Laws Act 8780d § 9.2, and hence was not eligible for unemployment benefits during such period.

Judgment affirmed.

1. Social Security and Public Welfare ☞387

Pro rata vacation pay, to which employee, laid off through no fault or desire of his own, was entitled under collective bargaining agreement at rate of specified percentage of earnings since last preceding annual computation date, constituted wages payable with respect to period commencing immediately upon termination of employment and continuing until vacation pay had been used up at his current hourly wage, and hence during such period he was not "unemployed" within meaning of Unemployment Insurance Act and was ineligible for unemployment benefits. Gen.Laws, Act 8780d, §§ 1 et seq., 9.2.

See publication Words and Phrases, for other judicial constructions and definitions of "Unemployed".

2. Social Security and Public Welfare ☞387

Unemployment compensation acts are generally construed not to permit payment of unemployment benefits for period during which employee is on vacation and receiving compensation by way of vacation

pay, even though vacation with pay is given in conjunction with termination of employee's services so that he is not to return to former employment after vacation period. Gen.Laws, Act 8780d, § 1 et seq.

3. Social Security and Public Welfare ☞271

The fundamental purpose of unemployment insurance is to cushion the impact of seasonal, cyclical and technological idleness and provide benefits to workers coming within provisions of the act for unemployment without their fault or consent. Gen. Laws, Act 8780d, § 1 et seq.

Victor C. Rose and Alfred M. Klein, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw and Vincent P. Lafferty, Deputy Attys. Gen., for respondent Bryant, Director of Employment.

Louis Lieber, Jr., Frederick E. Hines, Santa Monica, John A. Dundas, for respondent Douglas Aircraft Co., Inc.

Ralph H. Nutter and Jack R. Berger, Los Angeles, for C. I. O., California Industrial Union Council, Amicus Curiae.

Bodle & Landye, Los Angeles, for Los Angeles Central Labor Council, Amicus Curiae.

FOX, Justice.

Petitioner was employed by Douglas Aircraft Company under a collective bargaining agreement between the Company and the Union. His services were terminated by Douglas on June 7, 1950, because of lack of work. The following day he registered with the Department of Employment for work and filed a claim for benefits under the California Unemployment Insurance Act. 3 Deering's General Laws, Act 8780d. The next day the Department of Employment ruled petitioner was ineligible for such benefits for June 8 and 9 upon the ground that he was not unemployed on those two days within the meaning of the act in that he was entitled to receive pro rata vacation pay from Douglas in the amount of \$18.41, which was the equivalent of his wages for 12.6 hours of

work at his hourly rate when he was laid off.

The employee appealed this decision to a referee of the Department of Employment. The referee held that the department's decision that the pro rata vacation pay was allocable to the two-day period, June 8 and 9, was erroneous and that the employee was entitled to unemployment benefits for those two days. The employer thereupon appealed the referee's determination to the California Unemployment Insurance Appeals Board, which reversed the referee's decision and sustained the department's original ruling, holding the employee was ineligible for unemployment compensation benefits for June 8 and 9, 1950.

Petitioner sought a writ of mandamus to set aside the decision of the appeals board and to compel the commission to accept as valid his claim for unemployment benefits commencing on June 8, 1950. The court refused to issue the writ and rendered judgment in favor of respondent. Petitioner appeals from this judgment.

Whether petitioner was eligible for unemployment benefits during the two days in question depends on an analysis of the applicable provisions of the act and of the collective bargaining agreement. Section 9.2 of the act provides that an "individual shall be deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him". Admittedly no services were rendered by petitioner for Douglas on June 8 and 9, 1950, but petitioner did receive wages, for it is obvious that the vacation pay which he received constituted wages and was not a gratuity. The question is, however, whether such wages were payable "with respect to" this period.

Under the collective bargaining agreement employees are entitled to vacations with pay. Undoubtedly, for administrative convenience, the amount of annual vacation pay for all eligible employees is calculated as of the same date, viz., the Sunday immediately prior to May 1 of each year. This is known as the "computation date." The employees are all given their checks for vacation pay at one time which

must be within thirty days after the computation date regardless of when, during that year, they may elect to take time off. This vacation pay is for a vacation period to be taken by the employee, if production requirements permit him to take time off and he elects so to do, during the twelve months following the computation date. Annual vacation pay is figured at 4 percent of an employee's gross earnings during the year *prior* to the computation date.

If, however, an employee is laid off "through no fault or desire of his own," as was true in the instant case, he does not lose the vacation benefits which have been accumulating since the last computation date. Rather, he receives his pro rata vacation pay, namely 4 percent of his gross earnings since the last computation date, at the time of his lay-off. Employees who quit or who are discharged for cause do not receive pro rata vacation pay.

Here we have a collective bargaining agreement which provides for "vacation pay," i. e., pay for a vacation. This is a term of common usage that is generally understood. Certainly the parties who negotiated this agreement must have understood it. There is no suggestion to the contrary. Thus, when they designated the checks which employees received immediately after the computation date as "vacation pay" they meant just that. Hence when an employee took time off during the 12 months following the computation date, as he was privileged to do if production requirements permitted, this extra check, based on his earnings for the previous year, constituted his wages "with respect to" such vacation period. The services rendered during the previous year simply lay the foundation for the vacation pay and the opportunity to take time off during the following year. It is clear the parties did not intend that vacation pay should be allocated to the period in which the services were rendered or that such benefits should be received during that period. The entire pattern for vacation benefits under the agreement looks to the future. It contemplates that such benefits will be earned during one period but will be received and enjoyed during a later period. There is no

provision in the agreement for an employee to realize his vacation benefits during the time he is earning them. He does not have the right to have 4 percent added to his weekly pay check as vacation pay nor to take off then an equivalent amount of time. To say that vacation benefits should be allocated to a period when they are not realizable is as illogical as it is contrary to the intent of the parties as expressed in their agreement.

[1] Petitioner emphasizes the fact that an employee who is entitled to an annual vacation and receives a vacation pay-check following the computation date has the option of not taking time off during the succeeding 12 months. What the effect, if any, would be on the allocation of an employee's check for annual vacation pay if he elects not to take time off is not before us and has no bearing on the instant case since the agreement does not give an employee who is laid off because of lack of work any option relative to vacation or vacation pay. It simply provides that he shall be given pro rata "vacation pay" computed as of the date of termination in the same manner as annual vacation pay. So, one who is laid off does not lose the vacation benefits which have been accumulating since the last computation date and which he was not entitled to collect as he went along. The future and contingent character of such benefits is here further emphasized by the fact that an employee who quits or who is discharged for cause does not receive such pay. The pro rata vacation pay which petitioner received was earned in the same way that annual vacation pay was earned. It has the same characteristics. The parties have designated it also as "vacation pay." They must have meant it was for vacation. But petitioner could not realize upon this vacation pay while he was earning it, nor could he then take time off. He could only come into the realization of this benefit upon the happening of the specific condition, viz., that his services were terminated "through no fault or desire of his own." He was then entitled to the money he had earned for his vacation which started immediately and continued until his vacation pay, had

been used up at his current hourly wage. Hence petitioner's vacation pay was paid "with respect to" such period, viz., June 8 and 9, 1950. Therefore he was not unemployed during those two days within the meaning of section 9.2 of the act and was ineligible for unemployment benefits.

To hold that petitioner was entitled to both vacation pay and unemployment benefits for the period here in question would be requiring the employer to make two payments for the same period since the employer's reserve account with the department of employment would be charged as a result of the payment of unemployment benefits. There are situations under collective bargaining agreements where an employer is required to pay an employee double, or at least more than his usual wage, for a particular period. The basis for such payments is found in the express agreement of the parties. In the absence of such a provision in the instant agreement it would be unreasonable to say that the parties intended that an employee who was laid off because of lack of work should receive vacation pay and unemployment benefits at the same time. If they had intended such a result they should have so stated.

[2] In support of our conclusion it is stated in 81 C.J.S., Social Security and Public Welfare, § 159, p. 243, that "Unemployment compensation acts are generally construed not to permit the payment of unemployment benefits for the period during which the employee is on vacation and receiving compensation by way of vacation pay; during such period the employee, although not actually working, is deemed not to be unemployed within the meaning of the statutory provisions. This result is not affected by the fact that the vacation with pay is given in conjunction with a termination of the employee's services, so that the employee is not to return to his former employment after the vacation period." In an annotation on the right to unemployment compensation as affected by vacation pay in 30 A.L.R.2d 366, 368, the author states: "It has generally been held that even though one is unemployed during certain weeks, he is not entitled to unemploy-

ment benefits for those weeks if he is receiving, has received, or is eligible for, compensation in the nature of vacation pay for such weeks." It is also pointed out in this annotation, 30 A.L.R.2d at page 368 that employees who receive vacation pay, based on a percentage of their earnings for the period preceding the vacations, are not entitled to unemployment compensation benefits even though the payment of the vacation allowance is not concurrent with the vacation period. This proposition is illustrated by *Kelly v. Administrator, Unemployment Compensation Act*, 136 Conn. 482, 72 A.2d 54. There the collective bargaining agreement provided for two half-year periods, with vacation pay for each period equal to 4 percent of the employee's gross earnings (as in the instant case) for the preceding six months, payment to be made within 21 days after the end of each six-month period. It also provided that the company could, if it chose, shut down the plant for vacation during the week in which July 4th fell. The company did this and some employees filed claims for unemployment benefits during that week. In denying these claims the court pointed out that the vacation pay these employees had received on June 21, which was based on their gross earnings for the six-month period prior to June 1st, was clearly related to the vacation period for the week in which the fourth of July fell. See, also, *Grobe v. Board of Review, Department of Labor*, 409 Ill. 576, 101 N.E.2d 95.

The decision and reasoning in *Battaglia v. Board of Review*, 14 N.J.Super. 24, 81 A.2d 186, 187, is particularly pertinent to the instant case. There plaintiff was employed by the Allied Textile Printers. He was laid off May 31, 1949. On June 30, 1949, he received from his employer a sum equivalent to 80 hours of pay under the terms of a collective bargaining agreement which provided for vacations, and provided, further, that workers who were laid off were entitled to the earned portion of the vacation pay. The check plaintiff received from his employer was the earned vacation pay. In denying plaintiff unemployment benefits for that period the court pointed out: "It

is not every case of unemployment which entitles an unemployed person to benefits. The purpose of the act is to provide some income for the worker earning nothing, because he is out of work through no fault or act of his own, until he can find employment or for the period stated in the statute, if he continues to be unemployed. It cannot be said that because one is unemployed during stated periods, he is entitled to benefits when he is receiving compensation by way of vacation pay for those periods."

In *Reid v. Board of Review, etc.*, 155 Ohio St. 6, 97 N.E.2d 31, plaintiff was laid off and given a two weeks paid vacation. Before the expiration of her vacation she filed an application for unemployment benefits. In denying her claim the court said since she was on a paid vacation she was, in effect, still employed and therefore ineligible for unemployment compensation.

Where plaintiff was not reemployed at the end of a two-week plant shutdown for vacations, but received vacation pay for the first week, it was held in *Consiglio v. Administrator, Unemployment Compensation Act*, 137 Conn. 693, 81 A.2d 351, that her employment terminated at the end of the week for which she received vacation pay, rather than at the date when she last worked, so far as determining her qualification for unemployment compensation was concerned.

An employee who had received unemployment compensation for the two weeks following his lay off from his job because of lack of work was denied compensation for the third week, during which the plant in which he was formerly employed was shut down for vacations, and for which week the employee received a check, under the vacation provision in the union agreement, equal to 2 percent of his earnings for the preceding year, the court, in *Wellman v. Riley*, 95 N.H. 507, 67 A.2d 428, holding he was not eligible for unemployment benefits for that week since he received wages with respect thereto. The court rejected the employee's contentions that no wages were payable to him during this particular week since he performed no services during it and that his vacation pay was

NEWMAN v. LOS ANGELES TRANSIT LINES.

Civ. 19269.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1953.

Rehearing Denied Nov. 3, 1953.

Hearing Denied Dec. 17, 1953.

earned during his prior employment. It is true the payment to plaintiff was carried on the employer's books as "wages" for the particular week and was so designated on the check notwithstanding he had been laid off three weeks earlier. This was not done in the instant case but it was the practical effect of the transaction.

Petitioner emphasizes that his employment relationship with Douglas was completely severed and he was free to take other employment when he was laid off and therefore the vacation pay was not wages for the period immediately following. It is, of course, true that Douglas could no longer exercise any control over petitioner, but the termination of his services did not cut off rights which he had earned such as his seniority right to be recalled to work for two years after lay off or his pro rata vacation pay. Also, as stated in *Kelly v. Administrator, Unemployment Compensation Act*, supra, 72 A.2d at page 55, "One may be in the employ of another even though for the time being one is on vacation."

[3] As pointed out in *Chrysler Corp. v. Calif. Emp. Stab. Comm.*, 116 Cal.2d 8, 16, 253 P.2d 68, the fundamental purpose of unemployment insurance is to cushion the impact of such impersonal industrial blights as seasonal, cyclical and technological idleness, and thus to provide benefits to workers coming within the provisions of the act for unemployment not occasioned with their consent or brought about by their fault. The payment, however, of unemployment benefits to a worker for a period of vacation with pay would not fulfill the purpose of the act. *Grobe v. Board of Review*, supra, 101 N.E.2d at page 99; *Wellman v. Riley*, supra, 67 A.2d at pages 429-430. The department of employment, the appeals board and the trial court fairly and correctly interpreted the agreement and the act, and arrived at a conclusion which is in harmony with the purpose of the act.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

Action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerking of streetcar while passenger was alighting therefrom. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment on verdict for corporation, and passenger appealed. The District Court of Appeal, Moore, P. J., held that failure of trial court to give instruction, on its own motion, concerning doctrine of last clear chance was not error.

Judgment affirmed.

1. Witnesses ⇨370(1)

It is proper to show antagonism or animosity of a witness toward a party.

2. Appeal and Error ⇨1048(6)

In action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerk of streetcar while passenger was alighting therefrom, even if allowing passenger's witness to be asked, upon cross-examination, whether she ever had a feeling of having a persecution complex was error, it was not prejudicial since witness answered that she did not.

3. Witnesses ⇨329, 342

A witness may be required to answer any question which tends to test his accuracy, veracity, or credibility, especially where witness is one of the parties.

4. Witnesses ⇨372(1)

Great latitude should be allowed in developing existence of bias of witness.

5. Witnesses ⇨268(1)

Liberal cross-examination of witness is the rule.

6. Appeal and Error ⇨232(2)

An adverse ruling upon a general objection is never basis for reversal except

where testimony elicited is not admissible upon any ground whatsoever.

7. Appeal and Error ⇨232(2)

In action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerking of streetcar while passenger was alighting therefrom, where passenger did not make specific objection to question asking her whether she had ever accused anyone of spying upon her continuously, adverse ruling upon her general objection to such question did not constitute basis for reversal in view of fact that passenger's answer revealed workings of her mind, and her own statement about frameups against her made jury more able to weigh her testimony.

8. Appeal and Error ⇨907(1)

Where, upon appeal in personal injury action, plaintiff contended that defendant's misconduct caused to be injected into trial question of how many prior attorneys plaintiff had had representing her in case prior to trial, but neither opening statement nor voir dire examination was in record, it would be presumed that no error occurred in either.

9. Appeal and Error ⇨907(1)

Court and counsel are presumed to have done their duty in absence of proof to the contrary. Code Civ.Proc. § 1963, subd. 15.

10. Appeal and Error ⇨206(2), 237(2)

Where, in personal injury action, no objection was made to question asking plaintiff whether Communism was behind case and whether she had accused anyone of being a Communist in case, and no motion was made to forbid repetition of such questions, but plaintiff used such question as opportunity for denouncing all who were opposing her lawsuit in terms of Communism and otherwise, asking of such question was not reversible error.

11. Trial ⇨28(2)

Whether court should grant application for view of mechanical device whose operation is allegedly cause of accident involved in lawsuit is matter peculiarly within discretion of trial court.

12. Trial ⇨28(3)

Where, in action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerking of streetcar while passenger was alighting therefrom, where no proof was made that car used in demonstration or that manner of opening doors and steps was at all different from condition of device at time of accident, permitting demonstration of mechanical operation of streetcar door and steps was not error.

13. New Trial ⇨13

New trials cannot be ordered merely because dissatisfied litigant requests it.

14. New Trial ⇨95

Where, in action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerking of streetcar while passenger was alighting therefrom, even if person other than one produced by corporation was streetcar motorman, fact that passenger would have known identity of such other person eleven months prior to trial would prevent grant of new trial on ground that man produced was not the motorman.

15. Appeal and Error ⇨217

New Trial ⇨54

Before appellant could urge alleged fact that two jurors slept through most of trial as ground for reversal or new trial, appellant had to show affirmatively that neither she nor her counsel had knowledge of such fact prior to submission of case.

16. Appeal and Error ⇨891

New Trial ⇨140(3)

Rule that juror may not impeach his verdict except by proof that it was result of lot or chance may not be circumvented by permitting hearsay concerning juror's conduct during trial for purpose of setting forth such conduct as ground for reversal or new trial. Code Civ.Proc. § 657.

17. Appeal and Error ⇨1069(1)

Even if two jurors had slept through-out personal injury trial, plaintiff was not prejudiced in view of facts that jury returned unanimous verdict for defendant and that agreement by three-quarters of jury constitutes a valid verdict.

18. Appeal and Error ⇨714(5)

Settled and approved transcript cannot be impeached by charges contained in an appellate brief since error is not to be presumed and must affirmatively appear in the record.

19. Appeal and Error ⇨903

Presumption is that incidents of trial occurred as recorded in record.

20. Appeal and Error ⇨907(1)

In action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerking of streetcar while passenger was alighting therefrom, where there was no evidence in record that passenger was excluded from demonstration of streetcar doors and steps, presumption was that passenger was not excluded.

21. Attorney and Client ⇨86

Attorney is client's agent, and, therefore, attorney is empowered to conduct cause during its pendency, and his agreements with reference to calling or excusing witnesses at trial are binding upon client.

22. Stipulations ⇨14(7)

Upon appeal in action by streetcar passenger against transit corporation for injuries allegedly sustained in fall while passenger was alighting from streetcar, passenger was bound by stipulation between her counsel and opposing counsel that testimony of one of her witnesses would be substantially the same as that given by another, and, therefore, fact that passenger's counsel did not have such witness testify did not constitute error.

23. Appeal and Error ⇨204(2, 3)

In personal injury action, plaintiff could not make objection, for first time upon appeal, that some testimony of defendant's witnesses was hearsay and was not best evidence but came close to constituting forgery.

24. Appeal and Error ⇨204(1)

Objection to evidence cannot be interposed for the first time in the appellate court.

25. Appeal and Error ⇨882(8)

Appellant cannot base his appeal on admission of testimony which was read to jury by his own counsel.

26. Trial ⇨140(1)

Inconsistencies do not render testimony inadmissible, but such matters are to be resolved by the trial court.

27. Appeal and Error ⇨882(8)

In action by streetcar passenger against transit corporation for injuries allegedly sustained in fall while passenger was alighting from streetcar, receiving in evidence of deposition of corporation's witness did not constitute error in view of fact that such deposition, which contained conflicting statements concerning time of arrival of streetcar, was read into evidence by appellant passenger's counsel.

28. Evidence ⇨60, 89

A witness is presumed to speak the truth, but such presumption may be overcome by contradictory evidence, by manner of testifying, by character of his testimony or by evidence that pertains to his motives.

29. Witnesses ⇨317(1)

A witness false in one part of his testimony is to be disregarded in others.

30. Witnesses ⇨317(3)

The jury may reject whole testimony of witness who has wilfully testified falsely on material point unless, from all the evidence, jury believes that probability of truth favors his testimony in other particulars.

31. Evidence ⇨584(2)

Jury is not to discount testimony received by way of deposition for sole reason that it was in form of deposition, but such testimony is entitled to the same rebuttable presumption of verity and same judgment of jury with reference to its weight as testimony of any witness appearing on stand.

32. Trial ⇨296(10)

In action by streetcar passenger against transit corporation for injuries sustained while passenger was alighting from streetcar, giving of instruction pertaining to

deposition of a party did not constitute a singling out of passenger as only one whose credibility was to be tested and determined by jury in accordance with instruction in view of other instructions given pertaining to judging of credibility of both witnesses and depositions of witnesses.

33. Witnesses ⇨379(10)

In action by streetcar passenger against transit corporation for injuries sustained while passenger was alighting from streetcar, reading of two questions from passenger's deposition for purpose of contradicting passenger's testimony was proper practice since it aided jury's understanding of passenger's testimony.

34. Appeal and Error ⇨882(12)

In personal injury action, plaintiff could not complain of giving of instruction pertaining to obligations of carrier to its passenger in view of fact that instruction was given exactly as submitted by plaintiff to the court.

35. Trial ⇨217

In personal injury action, giving of defendant's instruction that it would be violation of jurors' duty to consider question of injuries or damages, if any, prior to determining issue of liability or to allow question of injuries or damages, if any, to affect their judgment in determining issue of liability was not error despite plaintiff's charge that instruction implied to jury that plaintiff had not been injured.

36. Trial ⇨315

A jury must not appraise damage suffered prior to finding whether tort-feasor is liable.

37. Appeal and Error ⇨762

Questions presented for first time in reply brief upon appeal will not ordinarily be considered in absence of meritorious reason for delay, but the appellate court may examine such matters and allow appellant to discuss such points in a final brief upon application showing reasons such as sickness, inadvertence, or excusable neglect.

38. Appeal and Error ⇨699(4)

Failure of trial court to give an instruction may not be reviewed on appeal

unless record specifies the instruction and shows that it was requested and refused.

39. Trial ⇨255(11)

In action by streetcar passenger against transit corporation for injuries allegedly sustained in fall caused by jerking of streetcar while passenger was alighting therefrom, failure of trial court to give instruction, on its own motion, concerning doctrine of last clear chance was not error.

Paul L. Zimmerman and Roger W. Powers, Los Angeles, Yetta Newman, in propria persona, for plaintiff and appellant.

Trippet, Newcomer, Yoakum & Thomas, Robert C. Carlson and Henry F. Walker, Los Angeles, for defendant and respondent.

MOORE, Presiding Justice.

From a judgment based upon a unanimous verdict rejecting her suit for damages for personal injuries, plaintiff prosecutes this appeal. She asserts that the "judgment was obtained by fraud, perjury on the part of the defendant and each and every one of its witnesses concealing evidence from the court and jury producing a substitute operator instead of the actual true operator." She follows such assertion with her assignments of error and arguments thereon which will be treated in the same order in the following discussion.

The accident which caused plaintiff's injuries occurred according to the testimony of herself and her witnesses about three-thirty in the afternoon of December 19, 1948, on a "W" car at the intersection of Normandie Avenue and Washington Boulevard in Los Angeles. In leaving the streetcar, plaintiff and her daughter, Mrs. Diamond, were preceded by her witness Richardson. The substance of their testimony is in that of Mr. Richardson who testified that after the latter had alighted, he turned to find plaintiff "on the lower step * * * she had already fallen from the streetcar * * * the car was stopped * * * the steps were down * * * her feet were on the ground * * * Mrs. Diamond would have fallen if I hadn't grabbed her * * * at the same time the car started up the

step raised up." Mrs. Newman testified that the operator was "approximately 23 years * * * wearing no uniform * * * wore some shabby plain clothes and no badge and no number * * * had no hat on * * * as soon as I attempted to get off by stepping just the first step * * * he got in motion with a violent jerk which was beyond my help or control and I hit landing on all steps and partly on the platform up on my neck and then that middle step so severely hit me in my lower back * * * He kept on raising it and he threw me off here. He acted like a drunk man and he was a very sickly, thin, emaciated looking fellow."

It was established to the satisfaction of the jury that the car on which plaintiff rode to Normandie was No. 1536; the sole operator was Bailey; it carried on the westbound trip about thirty passengers when it reached Normandie, and not three as testified by Richardson; no accident occurred at that intersection. But since the sufficiency of the evidence to support the verdict is not in question, the assignments of error will be discussed in the order presented.

[1,2] The first assignment is the court's overruling appellant's general objection to the following question propounded to her on cross-examination: "Mrs. Newman, have you ever had a feeling of having a persecution complex?" To which she answered: "I don't." It is not improper to develop any feeling of antagonism or animosity of a witness toward a party. But if such ruling had been error, it could have caused no prejudice since the answer was favorable to appellant. *Ingalls v. Monte Cristo Oil & Development Co.*, 176 Cal. 128, 131, 167 P. 857.

[3-7] She complains of the court's adverse ruling on her general objection to the question: "Have you ever accused anybody of spying on you continuously?" She answered that "all kinds of attempts at frame-ups and wanting to run me down with a U-turn * * * another time engaging this woman who sits here and three more who tried * * * to get a fight and to take me to the City Counsel * * * There were

four of them against me * * * And you say persecution—there was nothing else but." The answer revealed the workings of her mind as intended by the inquisitor. With her own statement about frame-ups against her before the jury, they were more nearly able to weigh her testimony. By means of developing the situation of appellant with respect to her adversary, her interest, her motives, her inclination and prejudices, her powers of discernment and description, the cross-examiner placed the witness in her true light before the jury. Her answer showed that by reason of her suspicions she has erected a steel barrier of hate against her adversary. It is a rule of universal application that a witness may be required to answer any question which tends to test his accuracy, veracity or credibility and especially in the case of a party to the action where he appears as a witness. *Neal v. Neal*, 58 Cal. 287, 288. Great latitude should be allowed in developing the existence of bias. *People v. De Mello*, 28 Cal.App.2d 281, 286, 82 P.2d 457. Liberal cross-examination is the rule. *Crutchfield v. Davidson Brick Company*, 55 Cal.App.2d 34, 38, 130 P.2d 183; *People v. Wissenfeld*, 36 Cal.2d 758, 765, 227 P.2d 833. But appellant made no specific objection to the question asked her. An adverse ruling upon a general objection is never the basis for a reversal except in those instances where the testimony elicited is not admissible upon any ground whatsoever.

[8,9] Appellant contends that the misconduct of respondent caused to be injected into the trial the question of "how many prior attorneys appellant had had representing her in some phase of her case prior to the trial." She says it was first mentioned in respondent's opening statement or on the *voir dire* examination of jurors. Inasmuch as neither the opening statement nor the *voir dire* examination is in the record, it must be presumed that no error occurred in either. Court and counsel are presumed to have done their duty in the absence of proof to the contrary. Code Civ. Proc. sec. 1963, subd. 15. A glimpse at the record discloses that it was appellant that infected the record with the charge that respondent had "done everything to get away

all of our lawyers and doctors" and "as many as you could entice to your side to work for your interests." She maintains that the evidence shows clearly that respondent bought off her lawyers. But if respondent had incipiently injected the question of her numerous counsel, not a single objection was interposed to the admissibility of the evidence. No motion was made for the jury to be instructed to disregard appellant's prior testimony relating to her erstwhile attorneys.

[10] Appellant complains that an extraneous, immaterial issue was injected by respondent's asking her: "Is Communism behind this? * * * Have you accused anybody of being a Communist in this affair?" Not only was no objection made to such question, nor motion made to forbid their repetition, but appellant appears to have relished the inquiry as another opportunity for denouncing the motorman and all who were opposing her lawsuit. She said a great many of "them" are engaged in Communism and some of the lawyers too; "it was a law of terror" that they practiced in her case. She had already testified that "a man" entered the streetcar following her daughter at Vermont Avenue; that he spoke to the motorman and "turned around and took a good look at us * * * at both of us * * * One woman went after me on Hoover and the regular motorman got off and this hoodlum got in who drove that car * * * There is a terrific back-ground in this case. Wild things was done about me * * * It was nothing short of murder."

Appellant contends that it was error for the court over her objection to permit "a demonstration of the mechanical operation of the steps on the streetcar No. 1536"; that it was three years after the alleged accident and with a different and a skilled operator. She ignores the proof adopted by the jury that Mr. Bailey was the only person who had operated car No. 1536 on the day she asserts Mr. Richardson helped her alight therefrom. After the court on respondent's motion had ordered a demonstration of the steps, appellant's attorney stated that he had "never raised any issue so far as mechanical defects are concerned. We claim negligent

operation." Respondent's counsel replied that he purposed to show that the steps cannot be raised with more than 50 pounds whereas appellant's evidence had been that she sat on the second step—"spread out on the steps with my feet almost to the ground"; was five feet three inches tall and weighed in excess of 150 pounds. When asked by the court whether he objected to the demonstration, appellant's counsel stated: "Yes, I object to it. As a matter of fact, there is other testimony to the effect that she was not on the steps but leaning on the steps." The court again ordered the demonstration with the observation: "If there is enough in the record to justify several beliefs on the point, perhaps it would be of assistance to go and see the step and see how it works." Following the view of the steps' operation, it was stipulated that the demonstrator would testify that when he opened the streetcar doors the air gauge showed 60 pounds pressure.

[11, 12] Whether the court should grant the application for a view of a mechanical device whose operation was allegedly the cause of an accident is peculiarly within the discretion of the trial court. *Nunneley v. Edgar Hotel*, 36 Cal.2d 493, 501, 225 P.2d 497. No proof was made that the car used for the demonstration or that the manner of opening the doors was at all different from the condition of the device three years before. No other objection can on appeal be considered. *Shields v. Oxnard Harbor District*, 46 Cal.App.2d 477, 489, 116 P.2d 121; *Le Mesnager v. Hamilton*, 101 Cal. 532, 539, 540, 35 P. 1054.

[13, 14] Appellant contends that a new trial should have been granted by reason of the fact that she and her daughter had testified at the trial that Bailey was not the motorman and because they have since identified one Edward Rexford King as the operator of Car 1536 on December 19, 1948. New trials cannot be ordered merely because a dissatisfied litigant requests it. No fact or reason is asserted as a basis for believing that another trial might terminate with different results. The question of the identity of the operator was thoroughly tried; the records of respondent were pro-

duced in court to show that Bailey was the operator of Car 1536 and he was on the witness stand to corroborate their accuracy. Appellant had solemnly testified that the car from which she fell was No. 1536. No contrary testimony was offered. Furthermore, appellant showed no such diligence as would warrant the granting of her motion for a new trial. She learned from the deposition of witness Prutsman on November 14, 1951, that King was the operator of the car that followed Bailey and car No. 1536; and that the company records contained a photograph of King. At the trial King's photograph was delivered to appellant's counsel who kept it during the trial. If Mrs. Newman knows now that King caused her injury she knew it eleven months prior to the trial. Such lack of diligence cannot be rewarded.

[15-17] Appellant assigns as error the conduct of the trial judge in "permitting two jurors to sleep during most of the trial." There is no record to support such assignment. Not an objection was made; not a request by appellant for the court to reprove somnolent jurors. Moreover, before an appellant may urge such dereliction of a juror as ground for a reversal or a new trial, he must show affirmatively that neither he nor his counsel had knowledge of the fact prior to the submission of the case. *Sherwin v. Southern Pacific Company*, 168 Cal. 722, 725, 145 P. 92; *Gray v. Robinson*, 33 Cal.App.2d 177, 91 P.2d 194. If a juror may not impeach his verdict except by proof that it was the result of lot or chance, Code Civ.Proc. sec. 657; *McWilliams v. Los Angeles Transit Lines*, 100 Cal.App.2d 27, 29, 222 P.2d 953, the rule should not be circumvented by permitting hearsay concerning a juror's conduct during a trial. *Woods v. Pacific Greyhound Lines*, 91 Cal.App.2d 572, 577, 205 P.2d 738. But if two jurors had slept throughout the trial, no prejudice was suffered. The jury returned a unanimous verdict, whereas the law required only three-fourths of the jury to return a valid verdict. See *People v. Thomas*, 108 Cal.App.2d 832, 837, 239 P.2d 914; *Anderson v. Pacific Tank Lines*, 52 Cal.App.2d 244, 249, 126 P.2d 153. Finally, not only is there no proof of the presence of the sleeping jurors, but at no time

did the trial judge observe such phenomenon.

Appellant asserts that she was excluded from the view of the demonstration of the streetcar doors and steps and also that at the demonstration respondent's witnesses were allowed to make statements in the hearing of the jury. In support thereof she claims further that the reporter's transcript is incorrect in its report of the events that transpired.

[18-20] The transcript, once settled and approved, cannot be impeached by charges contained in a brief. *County of Nevada v. Phillips*, 111 Cal.App.2d 428, 430, 244 P.2d 495; *Sawyer v. Sterling Realty Company*, 41 Cal.App.2d 715, 718, 107 P.2d 449; *Brush v. Pacific Electric Railway Company*, 58 Cal.App. 501, 503, 208 P. 997; *City of Chicago v. First Avenue Baptist Church*, 108 Cal. App.2d 297, 301, 238 P.2d 587. Inasmuch as error is not to be presumed, but must affirmatively appear in the record, it must be held that the criticized acts did not occur. No objection is found in the record to any ruling of the court and there is no evidence that appellant was excluded from the demonstration or that it was suggested. The presumption is that the incidents of the trial occurred as reported.

[21, 22] Error is assigned in that appellant's witness, Mrs. Suchman, was not permitted to testify after having been sworn. After respondent had rested, appellant called in rebuttal Mrs. Provin. The latter testified concerning the behavior of appellant after December 19, 1948. Thereupon, it was stipulated that the testimony of Mrs. Suchman would be substantially the same as that of Mrs. Provin. Since the need for the lady's testimony had disappeared, counsel for appellant did not call her. By reason of the fact that an attorney is agent of his client and is empowered to conduct the cause during its pendency, *Clemens v. Gregg*, 34 Cal.App. 245, 253, 167 P. 294, his agreements with reference to calling or excusing a witness are binding upon his client. *Brock v. Fouchy*, 76 Cal.App.2d 363, 372, 172 P.2d 945.

[23, 24] Assignment is made that the court admitted the "hearsay" testimony of witnesses Lacy and Spencer as "not the

best evidence and comes close to constituting forgery." The complaint is too late. No objection was made during the entire examination of these gentlemen. Therefore, error cannot be effectively asserted in the absence of objection to the introduction of the evidence. *Zumwalt v. Schwarz*, 112 Cal.App. 734, 738, 297 P. 608; *Thomason v. Hethcock*, 7 Cal.App.2d 634, 638, 46 P. 2d 832. Having failed to object at the trial, objection to evidence cannot for the first time be interposed in the appellate court. *Hughes v. Grandy*, 78 Cal.App.2d 555, 570, 177 P.2d 939.

[25-27] Because the deposition of witness Prutsman gave two different times of day for the arrival of car No. 1536, appellant charges error in the court's receiving same. Such deposition was read into evidence by appellant's counsel, not by respondent. An appellant cannot base his appeal on the admission of testimony which was read to the jury by his own counsel. *People v. Harby*, 51 Cal.App.2d 759, 769, 125 P.2d 874; *Gjurich v. Fieg*, 164 Cal. 429, 433, 129 P. 464. Moreover, inconsistencies do not render testimony inadmissible. Such matters are to be resolved by the trial court. *Kuhn v. Gottfried*, 103 Cal. App.2d 80, 84, 229 P.2d 137.

[28-32] The court gave the following instruction:¹

"If, prior to the trial, the deposition of a party to the action was taken, and if all or part of it was read into evidence, and if, in said deposition she made contradictory statement or statements in conflict with her testimony here in court, you may consider such conflicts, and any explanation given therefor, in testing her credibility, in like manner as if all such testimony were given originally at the trial. The deposition, too, was given under oath. Also, if any statement in a party's deposition constituted an admission against interest, it may be considered in determining the truth or falsity thereof as well as in judging her credibility."

Notwithstanding that correctness of the

foregoing is not questioned, appellant claims it is prejudicial error because it "singles out the plaintiff for the giving of the instruction and does not make it a general instruction applicable to all persons * * *" The fact is that it concerns and is limited to "the deposition of a party to the action." Appellant is the only party who gave a deposition. The instructions which preceded 31-A were general and applied to witnesses as well as to depositions of witnesses, setting forth the rules that in judging credibility, a witness is presumed to speak the truth; that such presumption may be overcome by contradictory evidence, by the manner of testifying, by the character of his testimony or by evidence that pertains to his motives; that a witness false in one part of his testimony is to be disregarded in others; the jury may reject the whole testimony of a witness who has wilfully testified falsely on a material point, unless, from all the evidence, the jury believes that the probability of truth favors his testimony in other particulars; that the jury are not to discount testimony received by way of deposition for the sole reason that it was in form of deposition; that it is entitled to the same rebuttable presumption of verity and the same judgment of the jury with reference to its weight as that of any witness appearing on the stand. By reason of such instructions having preceded 31-A, it cannot be reasonably asserted that appellant was singled out as the only one whose credibility was to be tested and determined by the jury. Appellant would reverse the rule and weigh and consider any one instruction separately from all others instead of reading it in its context. *Perbost v. San Marino Hall-School for Girls*, 88 Cal.App.2d 796, 801, 199 P.2d 701.

[33] As to the use of Mrs. Newman's deposition, only two short questions were read from it to contradict the testimony she had just given on the stand. Such was proper practice as an aid to the jury's better understanding of the lady's testimony.

[34] The court gave the following instruction:²

1. It is 31-A from B.A.J.I.

2. B.A.J.I. 204 I.

"The relationship of passenger and carrier, during the existence of which the carrier is obligated to exercise the highest degree of care, continues while the passenger is in the act of alighting and until she has actually cleared the car or has had reasonable opportunity after leaving the streetcar to get beyond danger from its operation. When, however, she has alighted from the streetcar and has had the reasonable opportunity I have mentioned, from that time on she is no longer a passenger, and the carrier is not responsible for her safe passage thereafter to any intended point of arrival."

Appellant claims that she was prejudiced by the presence in the instruction of the following words: "she has actually cleared the car" and "she has alighted from the streetcar." But the portion containing the criticized words is exactly as appellant submitted it to the court. She is in no position therefore to complain of it. *Yolo Water & Power Company v. Hudson*, 182 Cal. 48, 51, 186 P. 772; *Pomerantz v. Bryan Motors, Inc.*, 92 Cal.App.2d 114, 120, 206 P.2d 440.

[35] The following instruction was read to the jury:

"I instruct you that it would be a violation of your duty as jurors to consider the question of injuries or damages, if any, prior to determining the issue of liability or to allow the question of injuries or damages, if any, to affect your judgment in any way in determining the issue of liability. The first question for you to decide is whether or not the plaintiff is entitled to recover in this action against the defendant. If you find from the evidence that plaintiff is not entitled to recover, then it is your duty to immediately return the verdict in favor of said defendant." [Requested by defendant.]

Appellant claims that she was prejudiced thereby by reason of the fact that the language used therein "implies to the jury that plaintiff was not injured by the use of the words, to wit, 'injuries or damages, if any,' twice and the use of the words 'violation of your duty as jurors' and 'your duty to im-

mediately return the verdict in favor of defendant' would lead the jury to believe that they had to bring in a verdict for the defendant and against the plaintiff."

[36] No error is apparent in the instruction. It is trite to say that a jury must not appraise the damage suffered prior to finding whether the tort-feasor is liable. That can be done only from the evidence. *De La Torre v. Johnson*, 203 Cal. 374, 378, 264 P. 485; *Church v. Payne*, 36 Cal.App.2d 382, 401, 97 P.2d 819. The courts have gone so far as to hold it prejudicial error (1) to refuse to advise the jury that instructions on damages have been given so that all law pertinent to the issues may be before the jury in the course of their deliberations; and (2) to reject an instruction that the giving of instructions on damages must not be considered as intimating any view of the court on the issue of liability or as to which party should recover judgment. *Rasich v. Gladding McBean & Company*, 90 Cal.App.2d 241, 243, 202 P.2d 576.

Appellant's criticism of the phrase "injuries or damages, if any" is hypertechnical. Not only did respondent deny that appellant received any injuries but the evidence was such as would have justified a finding that respondent was not negligent and that appellant suffered no injury. The phrase "if any" does not, in the quoted instruction, imply that no injuries were received, but leaves to the jury the determination of whether Mrs. Newman was injured as she alleged or was not injured as respondent alleged. It enabled the court to instruct on the issues of liability and damage without assuming as a fact that injury had been sustained. *Cooney v. Pirrelli*, 204 Cal. 4, 6, 266 P. 273. The phrase is commonly used in instructions on the recovery for drug, hospital and doctor's bills.

[37] In her reply brief, appellant presents for the first time the question of error of the trial court's failure to instruct the jury on the doctrine of last clear chance. Questions presented in this manner will not ordinarily be considered by the appellate court in the absence of meritorious reason for the delay. But the court may nevertheless examine such matters, and may allow an appellant to discuss new points in a final

brief upon application showing a reason such as sickness, inadvertence, or excusable neglect. 4 Cal.Jur.2d 324. Appellant has made no such application and in fact failed to mention that this question was raised for the first time in her reply brief.

[38,39] Appellant does admit that no such instruction was requested. Assuming that such an instruction would have been proper, the rule is that the failure of a trial court to give an instruction may not be reviewed on appeal unless the record specifies the instruction and shows that it was requested and refused. *McFate v. Zuckerman*, 130 Cal.App. 172, 179, 19 P.2d 532. This rule has been applied in cases of failure to instruct on the doctrines of *res ipsa loquitur*, *Mills v. Los Angeles Junk Co.*, 3 Cal.App.2d 546, 548, 40 P.2d 285; *Comstock v. Morse*, 107 Cal.App. 71, 75, 290 P. 108, and contributory negligence. *Mella v. Hooper*, 200 Cal. 628, 631, 254 P. 256. There is no reason why the giving of an instruction involving doctrine of the last clear chance should constitute an exception to this rule. The authority cited by appellant, *Sills v. Los Angeles Transit Lines*, 40 Cal.2d 630, 639, 255 P.2d 795, is not in point since it concerns requested but refused instructions. It was not error for the trial court to fail to give the instruction in question on its own motion.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



120 Cal.App.2d 705

HUNTINGTON v. HUNTINGTON.

Civ. 19562.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1953.

Rehearing Denied Nov. 6, 1953.

Action by wife for divorce, support, and custody of and support for parties' two children. Husband pleaded, in bar, a Ne-

vada divorce decree. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment in favor of wife, and husband appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to establish that husband's claim of having established a new residence in Nevada prior to Nevada decree was fictitious.

Judgment affirmed.

See also 262 P.2d 110.

1. Divorce ⚡327

Good faith of spouse who migrates to sister state for purpose of obtaining divorce is question of fact, and spouse who asserts invalidity of a decree thus gained has burden of proof.

2. Divorce ⚡327

In action by wife for divorce, support, and custody of and support for parties' two children, wherein husband pleaded in bar a Nevada divorce decree, evidence was sufficient to establish that husband's claim of having established a new residence in Nevada prior to Nevada decree was fictitious.

3. Divorce ⚡330

Defendant in Nevada divorce action is at liberty to attack collaterally the divorce decree so long as defendant has not participated in the Nevada case or made a personal appearance therein.

4. Divorce ⚡330

Wife, who brought California action for divorce, support, and custody of and support for parties' two children, but who did not visit Nevada during or make legal appearance in Nevada divorce proceeding brought by husband, was not barred from attacking Nevada divorce decree which husband pleaded in bar in wife's California action.

5. Divorce ⚡327

Bona fides of galloping litigant in search of a forum wherein to seek a divorce is a question of fact.

6. Divorce ⚡200

After court has by implication allowed partial payment of attorney's fees on account and thereby reserved jurisdiction to

determine entire amount of such fees upon conclusion of trial in divorce action, the court does not thereby lose jurisdiction to make such determination. Civ.Code, § 137.

7. Divorce ⇨229

Where, at hearing on order to show cause in divorce action, court ordered husband to pay counsel for wife \$6,000 on account in connection with legal services theretofore rendered and then contemplated to be rendered, the \$6,000 did not constitute the total attorney's fee but could be supplemented if services actually rendered justified further award. Civ.Code, § 137.

8. Divorce ⇨240(5), 308

Where husband had annual gross income of about \$50,000, but, after award of \$1,000 a month alimony to wife and \$600 per month for support of parties' two children, family group would have, after taxes, \$30,000 per year for its support instead of \$25,000 prior to divorce, and husband would have for himself alone more than half of his old income, which had been used to support entire family, award of such alimony and support was not grossly excessive.

9. Divorce ⇨256

Where husband was life beneficiary of trust administered in Los Angeles county in which all manner of writs of enforcement were available to wife, imposition of lien, in divorce decree obtained by wife, upon husband's separate estate to secure enforcement of divorce judgment was within trial court's jurisdiction and was proper.

10. Divorce ⇨299

In divorce action, evidence was sufficient to establish that requirement that husband give one day's advance notice before calling to see his children, custody of whom was in wife, did not constitute an abuse of trial court's discretion.

11. Appeal and Error ⇨1031(3)

Where appellant, who complained of numerous errors in admission of evidence, did not set out such errors in brief but only made reference to reporter's transcript, it would be assumed that none of such errors was prejudicial.

Newell & Chester, Los Angeles, By Robert M. Newell, Los Angeles, for appellant.

Hightower & Martin, Los Angeles, By John L. Martin, Los Angeles, for respondent.

MOORE, Presiding Justice.

To an action by respondent filed December 18, 1951, for divorce, for support, and for custody and support of her two children, appellant answered February 4, 1952, with a general denial, and on June 13 in a supplemental answer he pleaded in bar that the District Court of the First Judicial District of Nevada had on March 27, 1952, granted him a final decree of divorce. The issues thus created were resolved by findings whereby the court below determined that (1) by reason of appellant's cruelties, respondent is entitled to a decree of divorce; (2) she is a fit and proper person to have the custody and care of her children; (3) appellant is capable of supporting his wife and children on a high standard of living to which he had habituated them; (4) appellant had an annual income of \$53,000 in 1951 from a trust held by the Security First National Bank of Los Angeles, and for 1952 it will be about \$48,000; (5) he is a life beneficiary of such trust fund; (6) he is capable of paying for the support and maintenance of respondent and her children and for reasonable compensation to the attorneys of respondent and necessary costs of suit and expenditures incurred in the protection of the interests of respondent and her children; (7) respondent is without sufficient funds with which to maintain herself and children or to pay reasonable compensation to her attorney and others contributing to the prosecution of her cause and to pay the necessary costs and money necessarily expended and debts incurred by respondent during the pendency of this action and to June 15, 1952, in the sum of \$1,450.96. Other findings will appear in the discussion.

Because the findings declare and the judgment decrees that appellant took steps in bad faith to make Nevada his permanent home, his first ground for a reversal is that "Defendant's Nevada Divorce Decree Was Entitled to Full Faith and Credit."

In support of such proposition appellant cites *Williams v. North Carolina*, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577; *Hinderlider v. LaPlata, River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202; *Baldwin v. Baldwin*, 28 Cal.2d 406, 170 P.2d 670; *DeYoung v. DeYoung*, 27 Cal.2d 521, 165 P.2d 457; *Murphy v. Travelers Insurance Company*, 92 Cal.App. 2d 582, 207 P.2d 595; *Lowe Corporation v. Rasmusson*, 53 Cal.App.2d 490, 127 P.2d 1002; 2 Nelson, *Divorce and Annulment* (2d Ed.) 499; Keenan, *On Residence and Domicil*, 457. Such authorities in general terms uphold certain statements of appellant made in his attempts to overcome the findings of fact and to discredit the adjudication of his bad faith. But under a cold analysis, it is clear that they are inapplicable to the findings or to the evidence in the record.

[1] The good faith of a spouse who migrates to a sister state for the purpose of obtaining a divorce is a question of fact and he who asserts the invalidity of a decree thus gained has the burden of proof. Respondent accepted the burden and produced a generous quantity of evidence in support of her contention. Appellant was born in Los Angeles County. He was reared and educated there, and there resided, voted, married, established a home, and became the father of two children. His only bank account prior to his sudden flight to Nevada was maintained in Pasadena and his only income was from a trust administered in the City of Los Angeles. He told neither his wife, nor his mother, nor his children of an intention to live in Nevada. In fact, he told no one but a crony in cups of his plan. He departed with a few personal effects, leaving his utility accounts and his safety deposit box in his own name. On his arrival in Reno he telephoned his wife he disliked the cold and would remain but a short time, and caused his attorney in that city to notify respondent that he was in the divorce capital because of marital difficulties.

[2] But appellant was not alone or lonely in the new place. He was there at-

tended by one "Lucille" who was bent upon a kindred mission. She resided with appellant in the same apartment, used the same attorney to get a divorce that represented her consort in his far-flung venture, and he supplied her with clothes and otherwise maintained her. But evidently aiming to make a record of events that would establish his good faith residence, before leaving he resigned from the Pasadena golf club where he never played; at increased expense he changed his membership in the California Club of Los Angeles to "non-resident" status. In Reno he procured a chauffeur's license; registered his automobile; paid a personal property tax in the amount of \$8.90 and a poll tax in the sum of \$3. He registered as a voter but never exercised his right of franchise, leased an apartment at \$85 per month and opened a bank account with \$200 but never drew a check. He did tell some of his witnesses in Reno he was to make Reno his permanent home. He established no business or place to transact his affairs but received his mail at the office of his Reno attorney. Such facts and others to be mentioned are sufficient to warrant the finding that appellant's claim of having "established a new residence for himself in the State of Nevada after December 15, 1951, is sham and fictitious * * * said Nevada residence * * * being merely colorable and designed to invoke the jurisdiction of the Nevada courts * * * was simulated or pretended and for the purpose of obtaining a divorce, and * * * with the intention to leave Nevada when he accomplished such purpose. No bona fide domicile was established in Nevada by either of the spouses."

Under the findings, then, appellant was still a domiciliary of California at the time he commenced his action for divorce in Nevada. His activities ostensibly designed to establish the good faith of his residence were not conducted with a sincere intent; also, the circumstances under which they were performed are such as to warrant the finding that they were dishonestly designed to identify appellant with Nevada and, therefore, are not sufficient to effect a

change of domicile. Civ.Code, §§ 150, 150.1, 150.2.¹

It is equally established by the record that respondent was domiciled in California at the time the Nevada action was commenced and continues to be so and did not participate therein or file a personal appearance.

From the language of the cited code sections it is evident that the legislature conceived that when a divorce decree is certified from Nevada, the full faith and credit clause is not necessarily applicable until a compliance with the requirements of due process has been shown. However, inasmuch as appellant bases his claim to a reversal primarily upon the ground that full faith and credit was not extended to his Nevada decree, exploration of that topic is indispensable to a complete disposition of this appeal.

[3-5] A defendant in a Nevada divorce action is at liberty to attack collaterally the decree so long as he did not participate in the case or make a personal appearance. *Estin v. Estin*, 334 U.S. 541, 549, 68 S.Ct. 1213, 92 L.Ed. 1561, 1568. But if he did participate in the Nevada action or if he was personally served, the defendant is inhibited from making a collateral attack upon the decree. *Coe v. Coe*, 334 U.S. 378, 384, 68 S.Ct. 1094, 92 L.Ed. 1451, 1459; *Sherrer v. Sherrer*, 334 U.S. 343, 351, 68 S.Ct. 1087, 92 L.Ed. 1429, 1436; *Johnson v. Muelberger*, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552, 556. The case of *Sherrer* suffered a unique fate. Even though both parties participated in the Florida action, the Massachusetts court held it was not entitled to full faith and credit because neither party had established a Florida domicile. But it is not pertinent to a consideration of the attack upon the judgment obtained by

appellant in Nevada. Not only did respondent not visit Nevada during the pendency of the action there, but she did not make a legal appearance in the case. She is therefore not barred from attacking appellant's decree. Appellant has industriously attempted to support the validity of his Nevada judgment by citing certain decisions that rejected attacks upon foreign divorce decrees. The leading authority invoked in his support is *Baldwin v. Baldwin*, 28 Cal.2d 406, 170 P.2d 670. That decision did, in truth, reject the attack upon the Nevada decree for the reason that the trial court determined as a fact that Mr. Baldwin did sincerely intend to remain in Nevada. That finding was the very backbone of the judgment and protected it from a collateral attack. He had waited three and a half months to file action after his arrival in that state. This appellant's hesitation after his six weeks had expired did nothing to increase the glamour of his good faith in the matter of establishing his long residence. The law is established that the bona fides of the galloping litigant in search of a forum wherein to seek a divorce is a question of fact. *Marshall v. Marshall*, 69 Cal. App.2d 20, 23, 157 P.2d 854. That fact herein was found adversely to appellant. Also, appellant cites *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 A. 684, 686; *Colburn v. Colburn*, 70 Mich. 647, 38 N.W. 607, 608. Both decisions held nothing more than that the good faith of an actual change of residence to another state with the intention of remaining there was not affected by the migrant's motive to procure a divorce. Moreover, appellant quotes at length from 2 Nelson, *Divorce and Annulment*, supra, and Keenan's *On Residence and Domicile*, The substance quoted merely declares

1. Civil Code:

"§ 150. This article may be cited as the Uniform Divorce Recognition Act.

"§ 150.1. A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

"§ 150.2. Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another jurisdic-

tion was (a) domiciled in this State within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this State within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this State and until his return maintained a place of residence within this State, shall be prima facie evidence that the person was domiciled in this State when the divorce proceeding was commenced."

fundamental principles inapplicable where the mala fides has been determined by the trial court.

On the contrary, the holdings are legion that the foreign decree is not entitled to full faith and credit where a spouse has taken *pro forma* steps to leave the domicile of his lifetime, ascertains the names of lawyers in the new jurisdiction that might best serve him, *Hall v. Hall*, 199 Miss. 478, 24 So.2d 347, 349; or becomes infatuated with another woman, resigns from lodge affiliations and applies in the new state for a position as teacher, *Cox v. Cox*, 137 N.J. Eq. 241, 44 A.2d 92, 96; or where a husband's conduct indicated that he had gone to Florida for the sole purpose of obtaining a divorce, *White v. White*, 80 U.S.App. D.C. 156, 150 F.2d 157, 158; *Evans v. Evans*, 80 U.S.App.D.C. 133, 149 F.2d 831; or where the defendant had gone to the new state and secured a divorce in violation of a temporary injunction issued in the home state, like appellant herein, told no one on his departure of his intention to establish a domicile beyond the borders of his domiciliary state, *Streitwolf v. Streitwolf*, 181 U.S. 179, 183, 21 S.Ct. 553, 45 L.Ed. 807, 810; or where the defendant leaves his home in New Jersey where his wife's action for divorce is pending and in Florida alleges only acts that had occurred in the state of his matrimonial domicile, *Mascola v. Mascola*, 134 N.J.Eq. 48, 33 A.2d 864, 866.

In *Roberts v. Roberts*, 81 Cal.App.2d 871, 185 P.2d 381, 386, although the wife had, while under the dominance and direction of her husband, gone to Reno where she employed the attorney specified by him and was duly granted a collusive decree of divorce, it was held (1) to be the duty of California courts to forbid interference with the status of its own citizens and to prevent the dissolution of a marriage by the decree of a court of a sister state that had no jurisdiction; (2) "this state is a party to every marriage contract of its own residents as well as the guardian of their morals"; and (3) a divorce granted by a Nevada court "without first having pursuant to its own laws acquired jurisdiction over one of the parties is a void decree".

That decision is a variant from *Heuer v. Heuer*, 33 Cal.2d 268, 201 P.2d 385, in which the Nevada decree was given full faith and credit because the wife had freely and of her own accord actively participated in the Nevada proceedings. In *Marshall v. Marshall*, supra, the husband had gone to Nevada while a divorce action was pending in California. His conduct before and after arriving in Nevada proved to be contrary to that of a bona fide resident. Because his residence was attempted in bad faith, his Nevada decree was nullified. Such are the morals and the law that the courts of this state will continue to reject a foreign divorce decree "in any case where, it is apparent, that the tourist plaintiff cocked one eye askance at the examining justice while solemnly swearing intention to remain permanently in the divorce forum-state and with the other eye anxiously watched the court room clock in nervous concern about catching the afternoon train 'back home.'" Justice Sicher in *Standish v. Standish*, 179 Misc. 564, 40 N.Y.S.2d 538, 546.

In addition to the vices of the Nevada decree discussed above, appellant must be reminded that not only did he know that he was restrained from proceeding with his action in the District Court of Nevada, but also, in the course of the proceedings before that court an affidavit was read into the record to the effect that Mr. Huntington had been restrained from proceeding with the action.

Attorneys' Fees

At the hearing on the order to show cause, the court ordered appellant to pay counsel for respondent \$6,000 "on account in connection with legal services heretofore rendered and now contemplated to be rendered by said attorneys, and the sum of Fifteen Hundred Dollars (\$1,500.00) for court costs, the employment of Nevada counsel, investigators, and the like, and in connection with all costs incurred to date by virtue of operations in this case connected with the State of Nevada." The order then proceeds to provide for the installment payment of such sums which was subsequently modified by reducing the monthly payments from \$500 to \$350.

[6,7] Appellant now contends that the court intended by its order to provide that \$6,000 should be the total attorney's fee to be paid for work to be done in the future ("now contemplated") as well as for "services heretofore rendered." He argues that not only was no proof made of the extent of such legal services, but no request was even made at the trial by respondent's lawyers for additional fees. Such contention is directly contrary to the holding in *Hellman v. Hellman*, 108 Cal. App.2d 588, 239 P.2d 458. The order made a year prior to judgment and before the defendant had answered directed the latter to "pay the plaintiff's attorney forthwith the sum of \$200 on account of counsel fees." It was held that by such order the court granted the plaintiff's application in part and "reserved for later determination the question whether a larger sum should be awarded." Pursuant to the reservation, the court after trial awarded payment of \$200 in addition to any sum theretofore paid. Such holding was in accord with *DeVall v. DeVall*, 102 Cal.App.2d 53, 58, 226 P.2d 605, 608, where the court at the hearing of the order to show cause directed Mr. DeVall to pay his wife "\$200 on account of attorneys' fees * * * balance, if any, pursuant to determination at time of trial." In *Nelson v. Nelson*, 100 Cal. App.2d 348, 223 P.2d 636, 638, the trial court reserved ruling on plaintiff's motion for "additional attorney's fees." When the trial was finished the court found as a fact that the sum of \$100 was a reasonable sum to be awarded for additional attorney's fees. From the cited decisions and others and from the general practice of courts in actions where counsel fees of one party are to be paid by the other, it is customary with trial courts frequently to defer the act of determining the full amount to be paid, but to reserve such decision for the court to make after observing the amount of service performed before appraising its value. After the court has by implication allowed partial payment on account and thereby reserved jurisdiction to determine the entire amount at the conclusion of the trial, the court does not thereby lose jurisdiction to make such determination. See Civ.Code, §

137. The phrase "on account" could have no other reasonable meaning than that the allowance of \$6,000 would be supplemented if the services actually rendered should justify a further award.

Alimony

[8] The court fixed \$1,000 per month as alimony for respondent and \$600 per month for support of the two boys, an annual total of \$19,200 out of his gross income of about \$50,000. Inasmuch as the trial court is vested with wide discretion in making such orders, in view of the evidence appertaining thereto, it cannot be said that the award is grossly excessive. Appellant admitted that \$1,250 per month would be a fair allowance. While his annual income is around \$50,000, aside from the instant judgment he has no serious outlay to reduce it save that of federal taxes and from the testimony of his tax expert "if no alimony were paid he would have to pay to the government federal income tax of \$23,318. If he paid alimony of \$17,400 per year, his federal income tax would be only \$11,385.50, in other words, almost half." Based on an income of \$50,000 and no deductions, appellant would have to pay about \$25,000 for federal income taxes. But in the situation presented, after \$12,000 is deducted for alimony payments, the federal income tax payable on \$38,000 would be about \$17,000, leaving him about \$21,000. After a payment of \$7,200 for the support of his sons, he has \$13,800 for his personal living expenses under the present judgment.

Out of her \$12,000 paid under the judgment, respondent will have to pay about \$3,000 federal income tax. It appears that the family group now has a total of \$30,000 for its support compared with \$25,000 prior to the divorce, and that appellant now has for himself alone more than half of his old income which supported the entire family.

Miscellaneous Assignments of Error

[9] Appellant complains that the court had no jurisdiction to split his separate income or to divide his property; or to impose a lien on his income. He says because his trust is administered in Los Angeles County where "all manner of writs of en-

forcement are available to plaintiff, the administration of the trust is unnecessarily interfered with by the alleged lien." The answer to such complaints is that only by the imposition of a lien upon his separate estate to secure the enforcement of the judgment can there be economic security for the wife and children. Were appellant's estate not under the lien imposed by the court, it might be alienated by assignment or attachment.

[10] The right of appellant to visit his children is not "unnecessarily interfered with." After hearing all the evidence of appellant's misconduct, and having had opportunity fairly to appraise respondent's character, it cannot be said that the court abused its discretion in requiring one day's notice in advance of his calling to see the children.

[11] Complaint is made of "numerous errors in the admission of evidence." Such errors are not set out in a brief but only references to the reporter's transcript are provided. From his manner of suggesting some twenty-eight errors, it must be assumed that none of them is prejudicial.

Judgment affirmed.

McCOMB and FOX, JJ., concur.



120 Cal.App.2d 715

HUNTINGTON v. HUNTINGTON.

Civ. 19564.

District Court of Appeal, Second District,
Division 2, California.

Oct. 19, 1953.

Hearing Denied Dec. 17, 1953.

Divorce action by wife. The Superior Court, Los Angeles County, Ellsworth Meyer, J., granted husband's motion to strike provision that he pay \$2,019.92 in costs and denied wife's motion to be allowed to file cost bill due to inadvertence, and

wife appealed. The District Court of Appeal, Moore, P. J., held that, where husband made special appearance at hearing of first order to show cause, no stipulation was made that additional court costs might be determined at time of trial, court did not expressly reserve jurisdiction to award later allowance of costs, no motion or request was made prior to or at trial for order requiring defendant to pay additional court costs, and wife submitted her cause without even introducing any evidence of additional expenditures, wife was not entitled to file cost bill due to inadvertence and provision for defendant to pay \$2,019.92 costs was properly stricken in view of fact that it included \$568.96 in additional costs.

Orders affirmed.

See also 262 P.2d 104.

1. Affidavits ⇨18

Divorce ⇨184(12)

Admission, after cause had been submitted and as ex parte proof, of affidavit of bookkeeper of wife's attorney in support of wife's costs taxed in divorce proceeding was error, but such error was harmless in view of fact that that portion of judgment which was included by reasons of contents of affidavit was stricken. Code Civ.Proc. § 2009.

2. Divorce ⇨197

Where, in divorce action, no stipulation was made that additional court costs might be determined at time of trial, court did not expressly reserve jurisdiction to award later allowance of costs, no motion was made for additional court costs, and wife, who did not introduce evidence of additional expenditures, was not entitled to file cost bill due to inadvertence, and provision requiring defendant to pay \$2,019.92 costs was properly stricken in view of fact that it included \$568.96 in additional costs. Code Civ.Proc. § 473.

3. Costs ⇨146

Even though court has jurisdiction of defendant's person, an award for costs incurred in the past is outside court's jurisdiction. Code Civ.Proc. § 473.

4. Divorce ⇐198

If wife, in divorce action brought by her, had expended \$645.63 prior to allowance for costs, wife did not have right to be reimbursed by husband in that sum, but, in good conscience, she owed such sum to husband where costs ordered paid by husband in interlocutory decree exceeded sum of such costs plus those that could probably be charged to husband. Code Civ.Proc. § 473.

5. Divorce ⇐198

Difference between advance payment on account of costs ordered in interlocutory decree and plaintiff's disbursements in prosecution of her divorce action after original order allowing costs was held in trust by wife for husband. Code Civ.Proc. § 473.

6. Divorce ⇐198

Where initial order in divorce action by wife required husband to pay wife's counsel \$6,000 on account in connection with legal services rendered and sum of \$1,500 for court costs, phrase "on account" applied only to the \$6,000 and not to the \$1,500 for court costs. Code Civ.Proc. § 473.

7. Divorce ⇐197

Affidavit of bookkeeper of wife's counsel was not equivalent to testimony when offered in support of disbursement of \$568.96 as costs in divorce action and did not confer jurisdiction to allow filing of belated cost bill after divorce decree had been entered. Code Civ.Proc. § 473.

Hightower & Martin, Los Angeles, by John L. Martin, Los Angeles, for appellant.

Newell & Chester, Los Angeles, by Robert M. Newell, Los Angeles, for respondent.

MOORE, Presiding Justice.

The questions here posed are (1) whether the court may require a husband to reimburse his wife or her lawyer for costs they have already incurred and expended in the prosecution of a divorce action; (2) whether, when an award against the defendant for costs for prosecuting a divorce case in-

cluded sums which the plaintiff had already expended, the latter, in good conscience owes such sums to the defendant; and (3) whether the court had jurisdiction to allow the filing of a belated cost bill.

This is a companion case to one of the same title numbered 19562 whereby the parties were divorced.

In December 1951, leaving plaintiff in Los Angeles, defendant migrated to the State of Nevada. His purpose was to establish residence and citizenship in the sister state whereby to avoid service of legal process of California courts. On the eighteenth of that month, plaintiff sued him for divorce in the court below and had an order to show cause issued against her husband to enforce the payment of alimony, court costs and attorneys' fees, *pendente lite*. Defendant made a special appearance solely for the purpose of attacking the jurisdiction of the court. At a hearing of the order to show cause on January 24, 1952, a minute order was entered, followed by a formal, written order dated January 29, 1952, which in part provides that the court had jurisdiction of the subject matter and of the person and property of the action, defendant having been duly served, and further directed payment by defendant of alimony to plaintiff and ordered him "to pay counsel for the plaintiff the sum of Six Thousand Dollars (\$6,000.00) on account in connection with legal services heretofore rendered and now contemplated to be rendered by said attorneys, and the sum of Fifteen Hundred Dollars (\$1,500.00) for court costs, the employment of Nevada counsel, investigators, and the like, and in connection with all costs incurred to date * * *." Defendant seasonably applied for a modification of the formal document and on March 31, 1952, it was amended so that the "monthly payments due from defendant to plaintiff's attorneys on account of attorneys' fees and costs heretofore ordered are reduced from \$500.00 per month to \$350.00 a month."

The cause was tried August 8, 1952. Findings favorable to plaintiff were filed, and the decree, adjudging defendant's Nevada divorce to be a sham, dissolved the mar-

riage "when one year shall have expired." Defendant's appeal therefrom, 262 P.2d 104, was duly lodged in this court. But the more vexing problem was not involved in that appeal. It appears that plaintiff's attorney testified that costs had been paid prior to the trial in the sum of \$1450.96 and that \$1200 thereof had been advanced by his firm to pay investigators and lawyers in Nevada. Thereupon, at the request of defendant's counsel, schedules were prepared by a competent accountant to aid the court. Plaintiff's counsel stated that after June 15, 1952, by reason of the accounting and other services required, there would be about \$500 additional expenses which would be proved by an affidavit to be filed prior to the entry of the interlocutory decree. Such affidavit was made by Miss Gier, the bookkeeper in the office of plaintiff's counsel. It showed that after June 15, 1952, such counsel had advanced \$568.96 in the prosecution of the action. But, although served previously, the affidavit was not filed until the day the judgment was filed. The trial judge evidently acted upon it by declaring in the judgment the amount of money disbursed by plaintiff's counsel on her behalf. The findings declare:

"The reasonable and necessary costs of action and money necessarily expended for the prosecution of this action incurred by Martha [the wife] during the pendency of this action to June 15, 1952, was the sum of \$1,450.96, and to the date this interlocutory decree is entered, Martha has spent in connection with such costs and expenses the additional sum of \$568.96. Said monies have been advanced by counsel for Martha."

This was followed in the conclusions by the following:

"The reasonable and necessary costs and expenses incurred by Martha in connection with this proceeding to June 15, 1952, is the sum of \$1,450.96 and since that date and to the date of the signing of these Conclusions, Martha has expended or incurred an additional \$568.96 in costs and expenses reasonably incidental and necessary to the prosecution of this proceeding,

and in protection of the interests of Martha and the minor children."

The judgment provided:

"The \$9,000.00 of attorney's fees hereby awarded and the said court costs and expenses incident to this proceeding, being in the total amount of \$2,019.92, shall be paid by the defendant to said counsel at the rate of Three Hundred Dollars (\$300.00) per month on the first day of each month hereafter, commencing August 1, 1952, until paid in full." While the decree was signed and filed August 8, and was entered August 11, 1952, no formal cost bill made appearance in the clerk's office nor was one ever served.

[1] Defendant duly moved "to retax plaintiff's costs and disbursements" adjudged "in the amount of \$2,019.92 on the ground that no memorandum of costs and disbursements was filed by plaintiff and that the time for filing same has elapsed." Also, he moved to strike from the decree the following: "and the said court costs and expenses incident to this proceeding being in the total amount of \$2,019.92." The court denied the motion to retax costs, but granted the motion to strike. A motion to strike the Gier affidavit was denied. While there is no provision in law for such *ex parte* proof after a cause has been submitted, Code Civ.Proc. § 2009, the ruling is harmless, inasmuch as that portion of the judgment included by reason of the contents of the affidavit was stricken.

The foregoing recital establishes beyond question that (1) at the hearing of the first order to show cause defendant made a special appearance; (2) there was no stipulation that additional court costs might be determined at the time of trial; (3) the court did not expressly reserve jurisdiction to award a later allowance of costs; (4) no motion was ever filed, or request made prior to or at the trial for an order requiring defendant to pay additional court costs; (5) plaintiff submitted her cause without even introducing any evidence of additional expenditures.

After the court had granted defendant's motion to strike the provision for defendant

to pay the sum of \$2,019.92, plaintiff moved under section 473, Code Civ.Proc., to be allowed to file a cost bill due to inadvertence. Affidavits in support of the motion and against it were submitted and the motion denied.

[2, 3] Both rulings were correct. Even though the court might have had jurisdiction of defendant's person, an award for costs incurred in *the past* is outside the court's jurisdiction. *Loveren v. Loveren*, 100 Cal. 493, 494, 35 P. 87; see *McClure v. Donovan*, 86 Cal.App.2d 747, 748, 195 P.2d 911, wherein one of respondent's counsel was an attorney for the appellant.

When the court awarded plaintiff \$1500 for court costs "to date" defendant had not yet appeared and of course no stipulation had been made for a later determination of costs. In such a situation there was no course open to plaintiff if she desired a new order except to apply within the lawful period to the court. But she did not do so. On the contrary, she took no action until one month had elapsed after her attorneys had been given notice of entry of judgment when she came up with her notice of motion to be relieved "from an order taken against her through mistake, inadvertence, surprise or excusable neglect." She wished to file a formal cost bill in the divorce action; she had relied upon the fact that the trial judge "also believed there was no need for a formal cost bill in a divorce proceeding, and she had merely incorporated the *monies expended* by the plaintiff to maintain the action and protect the interests of herself and her children as a part of the judgment * * *." From the language of the motion it is clear that an order allowing the proposed cost bill could have added nothing except sums that had *already been expended* by her and her attorneys.

[4, 5] There is still another reason why the court could not validly allow judgment for the "additional sum of \$568.96" besides the \$1,450.96 which plaintiff's attorney testified had been paid out prior to June

15, 1952. Plaintiff's counsel testified at the trial that of the \$1450.96, \$645.63 had been expended prior to the hearing at which the order was made for future costs and counsel fees. If she had expended \$645.63 prior to the allowance for costs, then she had no right to be reimbursed in that sum. *Loveren v. Loveren*, supra. In good conscience she owed it to defendant. Now, inasmuch as she held \$645.63, she could have paid herself the "additional \$568.96" expended *after* June 15, 1952. By reason of the fact that the total of plaintiff's disbursements in the prosecution of her action *after the original order* was only \$1,374.29, it would be unlawful to require defendant to pay her the further sum of \$568.96 as costs, to say nothing of the \$125.71¹ which she holds in trust for defendant.

The foregoing computation is predicated upon the assumption that the \$2,019.92 mentioned in the interlocutory decree includes the \$1500 ordered on January 29, 1952, to be paid by defendant. But if the motion to modify had been denied, then on the face of the minute order and the judgment, plaintiff would have recovered \$3,519.92—good reason alone for the modification.

[6] Plaintiff contends that because the initial order required defendant to pay her counsel "\$6,000 *on account* in connection with legal services" rendered and to be rendered, the court thereby reserved jurisdiction to order further payments of costs without first having an application therefor and without a hearing or proof of the expenditures. The answer to such contention is complete. The phrase "on account" follows the figures \$6,000 and is restricted to them. The words "and the sum of \$1500 for court costs, the employment of Nevada counsel, investigators, and the like * * * to date" is impliedly preceded by the verb "to pay." By virtue of a fair construction of the sentence, the phrase "on account" applies only to the \$6,000 and not to the "\$1500 for court costs."

In support of her contention that by use of the phrase "on account" the court retain-

1. Derived by subtracting the \$1,374.29 from \$1,500 advance payment on account of costs.

ed jurisdiction to award payment for "past expenses," plaintiff cites *Hellman v. Hellman*, 108 Cal.App.2d 588, 239 P.2d 458, wherein the husband was, at the hearing of the order to show cause, directed to pay his wife's attorney "forthwith the sum of \$200 'on account of counsel fees'." Granting the efficacy of the phrase, "on account," as claimed by plaintiff, the cited authority might be pertinent here if the phrase had followed "\$1500." But it did not. On the contrary, the \$1,500 was "for court costs." The modified order of March 28, 1952, was not made as an order to make payment, but was merely for the purpose of changing the terms of payment of the \$7,500. Moreover, Mr. Hellman made a general appearance in the action.

[7] The affidavit of plaintiff's counsel in support of the application to file a belated cost bill under section 473 did not state legal grounds for such an order. Plaintiff's attorneys knew at all times the necessity of applying to the court for an order for payment of prospective costs. They pursued that course in obtaining the award of January 29, 1952. No request was made by plaintiff for the court to reserve jurisdiction to determine at a later time whether plaintiff's additional costs should be paid by defendant. While plaintiff's counsel testified over objection that he had expended \$1,450.96 in the prosecution of the action, he merely promised to "present evidence of additional expenditures by his client later in the trial." But he did not do so. Had he made offer of such evidence, defendant would have been entitled to introduce evidence in reply thereto and might thereby have frustrated plaintiff's attempt. On the contrary, for the purpose of establishing her right to the "additional costs" expended, plaintiff filed with the court an ex parte affidavit of Miss Gier showing the disbursement of \$568.96 after June 15, 1952. Such affidavit was not equivalent to testimony. In any event, it did not confer jurisdiction to allow the filing of the belated cost bill.

Orders affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

120 Cal.App.2d Supp. 924

O'DONNELL et al. v. KENNEDY et al.

Civ. A. 9.

Appellate Department, Superior Court,
San Bernardino County, California.

Oct. 26, 1953.

'Action on note. The Municipal Court of San Bernardino Judicial District, C. O. Thompson, J., entered judgment adverse to makers, and makers appealed. The Superior Court, Appellate Department, Mitchell, J., held that, where purchaser of realty securing 1948 note had assumed makers' liability for unpaid balance of \$500 on 1948 note and of \$1000 on 1949 note in consideration for conveyance and had given payees, who had lent purchaser \$300, purchaser's \$1,800 note, which was then secured by such realty, obligation on 1949 note, upon which payees brought action against makers, was extinguished by substitution of the new obligation.

Judgment reversed.

Bills and Notes C-430

Where purchaser of realty securing 1948 note had assumed makers' liability for unpaid balance of \$500 on 1948 note and of \$1,000 on 1949 note in consideration for conveyance and had given payees, who had lent purchaser \$300, purchaser's \$1,800 note, which was then secured by such realty, makers' obligation on 1949 note was extinguished by substitution of the new obligation.

Harold Payne, Needles, for appellants.

C. P. Monningh, Barstow, for respondents.

MITCHELL, Judge.

On January 15, 1947, the appellants gave to Letha O. Perry a promissory note for the sum of \$1,000. This note was secured by a deed of trust.

On January 30, 1948, appellants satisfied the Perry note with money borrowed from respondents.

As evidence of this loan appellants gave to respondents their promissory note for \$1,000.

O'DONNELL et al. v. KENNEDY.

Civ. A. 10.

Appellate Department, Superior Court,
San Bernardino County, California.

Oct. 26, 1953.

Action on note. The Municipal Court of San Bernardino Judicial District, C. O. Thompson, J., entered judgment adverse to payee, and payee appealed. The Superior Court, Appellate Division, Mitchell, J., held that, where indebtedness, which was represented by note, had been paid, obligation was discharged.

Judgment reversed.

Bills and Notes 425

Where indebtedness, which was represented by note, had been paid, obligation was discharged.

Harold Payne, Needles, for appellant.

C. P. Monningh, Barstow, for respondents.

MITCHELL, Judge.

On August 17, 1949, respondents loaned to appellant the sum of \$360, and took from appellant his promissory note for the sum of \$413.

During the next fifteen months the appellant repaid to respondent the sum of at least \$438, perhaps \$498.

The overpayment may have been made on account of another loan of \$114.75.

The indebtedness having been paid, the obligation has been discharged.

Judgment reversed.

COUGHLIN, P. J., and FINDLAY, J.,
concurring.

This note was secured by a mortgage on certain real property.

This note was reduced to the sum of \$500 by October, 1949, at which time the property described in the mortgage was conveyed to H. D. Downer.

In the meantime, on April 12, 1949, respondents loaned appellants an additional \$640; and took appellants a note for \$1,000.

When appellants, on October 6, 1949, sold the real property to H. D. Downer the consideration therefor was the assumption by the purchasers of appellants' indebtedness to respondents, i. e.

1. Unpaid balance on note of June 30, 1948, secured by mortgage on the property conveyed.....	\$ 500.00
2. Unpaid balance on note of April 12, 1949	\$1000.00
A total of	\$1500.00

Downer not only assumed this indebtedness but agreed with respondents to pay it; and executed and delivered to respondents his promissory note therefor, plus an additional \$300, borrowed by him from respondents.

This note for \$1,800 was secured by a Deed of Trust on the same real property.

Appellants demanded the return of the notes executed by them; but the note of April 12, 1949, was not returned.

Respondents brought suit against appellants on the April 12, 1949, note.

Appellants pleaded two defenses;

1. That the note was usurious and void;
2. Extinction and discharge.

Since the obligation on this note of April 12, 1949, has been extinguished by the substitution of the new obligation therefor we need not pass upon the first defense.

The judgment is reversed.

COUGHLIN, P. J., and FINDLAY, J.,
concurring.

41 Cal.2d 587

COUGHLIN et ux. v. BLAIR et al.**L. A. 22740.**Supreme Court of California.
In Bank.

Oct. 20, 1953.

Action by purchasers for breach of realty purchase contract providing that utilities and pavement were to be brought to realty within 1 year without cost to purchasers. The Superior Court, Los Angeles County, J. T. B. Warne, Judge Assigned, entered judgment for purchasers, and defendants appealed. The Supreme Court, Traynor, J., held that where realty was reached by dirt road about 3,725 feet from public streets and utilities were an equal distance away, vendor and her agent agreed to install pavement and utilities to realty without cost to purchasers but vendor and her agent had not performed one year after expiration of time for performance, although repeatedly requested to do so, purchasers were entitled to damages for loss of use of realty and for increased building costs between date of performance and date of filing of complaint, but would not be entitled to damages for loss of use and increase in building costs between time of filing of complaint and date of trial.

Judgment affirmed in part and reversed in part and cause remanded.

Prior opinion, 252 P.2d 1009.

1. Evidence ⇨461(1)

If fact of agency appears in an integrated contract, and there is no unambiguous expression of intention either to make or not to make the agent a party thereto, extrinsic evidence is admissible to show the intention of parties.

2. Evidence ⇨461(1)

Where realty purchase contract designated certain person as agent, made reference to another person as the one who would receive down payment as liquidated damages, left blank after place for owner's signature, and contained language indicating that agent would be personally liable for surveying and for installation of improvements, since it could not definitely be

ascertained from contract whether agent had personally assumed obligation to perform, extrinsic evidence would be admissible, in action by purchasers for breach, to determine intention of parties.

3. Husband and Wife ⇨232(3)

In action by purchasers for breach of realty purchase contract which presented ambiguity as to whether owner's husband, who signed contract as agent, was to be personally liable for installation of utilities and pavement, evidence supported determination that it was intention of parties that husband should be personally liable.

4. Husband and Wife ⇨25(1)

In action by purchasers for breach of realty purchase contract which provided for installation of pavement and utilities at no cost to purchasers and which designated agent's wife as person to receive down payment upon forfeiture, although evidence established that agent was personally liable on contract, rule requiring election between judgment against undisclosed principal and agent was inapplicable, since contract at least indirectly identified wife as principal.

5. Stipulations ⇨14(1)

In action for breach of realty purchase contract providing for installation of pavement and utilities at no cost to purchasers, where parties stipulated that contract bound realty owner who had not signed contract but was referred to therein and that successor to interest of owner assumed and agreed to discharge obligations claimed or asserted by purchasers, successor could not thereafter contend that owner was undisclosed principal and that judgment against owner's agent, who was personally liable for installation of paving and utilities, constituted election to release successor.

6. Damages ⇨26**Judgment ⇨583**

In action for total breach of contract, plaintiff may recover in one action all his damages, past and prospective, and judgment for plaintiff absolves defendant from any duty, continuing or otherwise, to perform contract.

7. Damages Ⓒ29

If breach of contract is partial only, the injured party may recover damages for nonperformance only to time of trial and may not recover damages for anticipated future nonperformance.

8. Contracts Ⓒ321(1)

Even if breach of contract is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract.

9. Contracts Ⓒ321(1)

The circumstances of each case determine whether an injured party may treat a breach of contract as total.

10. Contracts Ⓒ321(1)

Where injured party has fully performed his obligations under a bilateral contract, courts usually will treat a breach as partial unless it appears that performance of agreement is unlikely and that the injured party may be protected only by recovery of damages.

11. Contracts Ⓒ317

Even if a breach may be considered partial at time performance is due, there is a limit to the time a promisee must thereafter await performance.

12. Vendor and Purchaser Ⓒ343(1)

Where realty purchase contract provided that utilities and pavement were to be installed by May 30, 1949, without cost to purchasers, and about one year after such date utilities and pavement still had not been installed despite repeated requests by purchasers, purchasers were justified in treating nonperformance as total breach.

13. Vendor and Purchaser Ⓒ351(7)

Where vendor under realty purchase contract agrees to make improvements on realty and fails to do so, proper measure of damages is ordinarily the reasonable cost to purchaser of completing work. Civ.Code, §§ 3300, 3359.

14. Vendor and Purchaser Ⓒ351(7)

Where vendor under realty contract agrees to make improvements on property other than that conveyed to purchaser, the proper measure of damages upon nonperformance is difference in value of realty

with and without promised performance. Civ.Code, §§ 3300, 3359.

15. Vendor and Purchaser Ⓒ351(7)

Where vendor and her agent agreed to extend utilities and pavement a distance of 3,725 feet to realty at no cost to purchasers, and vendor had reserved easement and right of way over road leading to realty, with right of constructing, maintaining, and repairing and operating same, proper rule upon nonperformance by vendor and agent, was difference between value of lot with and without promised performance, although purchasers had received deed granting nonexclusive easement over road leading to realty. Civ.Code, §§ 3300, 3359.

16. Vendor and Purchaser Ⓒ350

In action by purchasers for breach of realty purchase contract providing for bringing of utilities and pavement a distance of 3,725 feet to realty without cost to purchasers, evidence was insufficient to establish that vendor's successor and vendor's agent were entitled to credit for installation of 1200 feet of permanent paving and gas line on theory that such work was performed during period between date by which work was to be completed and date of filing of complaint, during which time purchasers treated breach as partial.

17. Contracts Ⓒ305(1), 316(5)

Where injured party accepts or urges performance by the promisor, he will not be allowed to obtain damages on the theory that performance has not been made.

18. Vendor and Purchaser Ⓒ351(7)

Where realty purchase contract provided that utilities and pavement were to be installed without cost to purchasers, purchasers repeatedly urged performance for about one year after date by which work was to be completed and then brought action for difference between value of lot with and without promised performance, vendor's successor in interest and vendor's agent would not be entitled to credit in such action for work performed after filing of complaint.

19. Damages Ⓒ15

Damages are awarded for breach of contract to give the injured party benefit

of his bargain and insofar as possible to place him in same position he would have been in had the promisor performed.

20. Damages ⇨22

Damages for breach of contract must be reasonable and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract. Civ.Code, § 3300.

21. Vendor and Purchaser ⇨351(7)

Where realty was reached by dirt road about 3,725 feet from public streets and utilities were an equal distance away and, about one year after date for completion of performance, vendor and her agent had not performed agreement to install paving and utilities to realty, although repeatedly requested to do so, purchasers were entitled, in action for breach, to damages for loss of use of realty and for increased building costs between date of performance and date of filing of complaint, but would not be entitled to damages for loss of use and increase in building costs between filing of complaint and date of trial.

22. Vendor and Purchaser ⇨351(10)

In action for breach of realty purchase contract providing that vendor and her agent were to install utilities and pavement to realty, where trial court awarded purchasers damages for loss of use of realty and increased building costs between time of filing of complaint and time of trial, such award could not be sustained as an award of interest, since amount of damages could not be ascertained except on conflicting evidence. Civ.Code, § 3287.

23. Evidence ⇨455

In action for breach of realty purchase contract providing that utilities and paving were to be installed at no cost to purchasers, extrinsic evidence was admissible to determine what parties meant by "paving". Civ. Code, § 1860.

24. Vendor and Purchaser ⇨350

In action by purchasers for breach of realty purchase contract providing that utilities and paving were to be installed without cost to purchasers, where case was tried by both parties on theory that state

specifications and city specifications for paving were the same, vendor's successor in interest and vendor's agent could not contend that finding that "paving" was intended to mean permanent paving conforming to city specifications for area was not supported by evidence.

25. Vendor and Purchaser ⇨350

In action by purchasers for breach of realty purchase contract providing that pavement and utilities would be brought a distance of 3,725 feet to realty without cost to purchasers, where purchasers' expert witnesses testified as to value of realty with and without improvements, evidence sustained finding that difference between market value of realty with and without promised performance was \$9,500.

26. Vendor and Purchaser ⇨350

In action by purchasers for breach of obligation of vendor and her agent under realty purchase contract providing that pavement and utilities would be installed without cost to purchasers, where there was evidence that vendor and her agent had ability to perform contract but for reasons they thought to their advantage refused to do so, finding that breach was deliberate was supported by evidence.

27. Vendor and Purchaser ⇨350

In action by purchasers for breach of realty purchase contract providing that pavement and utilities would be installed within one year without cost to purchasers, where there was evidence that purchasers had stated to vendor's agent that they intended to build three bedroom, rambling house, with playhouse and swimming pool on realty, evidence established that but for breach purchasers would have been able to take advantage of lower building costs existing at time of nonperformance and hence purchasers would be entitled to damages for increased building costs between performance time and filing of complaint.

Charles Reagh, San Francisco, for appellants.

Krystal & Paradise and Robert E. Paradise, Los Angeles, for respondents

TRAYNOR, Justice.

Louise Blair, wife of defendant John Blair, owned a tract of land on the hills overlooking Hollywood. Part of the tract had been subdivided. Lot 7, the parcel involved in the present litigation, is in an unsubdivided part of the tract. It is at the apex of a triangular hill and has an exceptional view and privacy. In May, 1948, when the contract involved in this action was executed, lot 7 was graded and had access to the public streets by means of a dirt road to Nichols Canyon Road, about 3,725 feet away. Gas and electricity had not been installed nearer than the intersection of Nichols Canyon Road and the dirt road leading to lot 7.

Plaintiffs Clarence Coughlin and Cathleen Coughlin, husband and wife, viewed the lot several times with defendant John Blair. They informed him that they wished to purchase the lot and to build a residence thereon within the following year. They told him that, "We were ready to sign for the property at his price provided he would agree that paving would be installed, electricity and gas would be installed, all within one year from the date of the agreement; that he would have the lot surveyed and staked, all of which was to be at his cost and at no cost to us." John Blair was willing to sell the property on those terms. Accordingly, on May 30, 1948, the parties executed on a deposit receipt form the contract set forth in the footnote.¹ Plaintiff Clarence Coughlin testified that he first became aware of Mrs. Blair's name after he had

looked at the deposit receipt. An escrow was opened in the name of Louise Blair. Plaintiffs paid the full purchase price of \$14,000 and received a deed from Louise Blair. The deed granted plaintiffs lot 7, with a "nonexclusive Easement for Ingress and Egress and for driveway purposes" to Nichols Canyon Road.

On May 30, 1949, the date that performance was due under the contract, the paving had not been done and neither gas nor electricity had been brought to the lot. During the following year plaintiffs wrote four letters to defendant John Blair demanding performance. Defendants did not repudiate the contract; nor did they perform their obligations thereunder. They did put temporary paving on part of the road to lot 7 in the fall or winter of 1949. Plaintiffs' last letter, on April 1, 1950, stated that they would institute an action, if the contract was not performed within thirty days. On May 24, 1950, plaintiffs brought this action. They did not seek rescission or specific performance. Instead, they sought damages for the difference in value of the property with and without the performance promised in the contract, and special damages for the loss of the use of the property and for the increase in building costs since the date performance was due.

At some time in 1950 permanent paving was installed on the road to lot 7 for a distance of 1200 feet commencing from the Nichols Canyon Road. In May of 1950 a gas line was installed over the same 1200

1. "Received from *Clarence W. Coughlin & Cathleen L. Married*

Date May 30th, 1948

Address 106 N. Maple Dr. Bev. Hill Cr. 18642 the sum of \$1000.00 being a part payment on Lot 7 in pros. Tract 15175 Metes & Bound Disp. (Subject to Restrictions and Reservations of Record). At price of \$14000 payable \$. cash (including the within payment) balance payable as follows: \$7500 in Escrow 5500 Balance on or before July 15th 1948. Gas & Pavement & Elec. to be put at no cost to buyer within 1 yr from above date also to be surveyed by Jno. H. Blair at once. Balance of first payment, to-wit: dollars to be deposited in escrow within days

from above date and failing to make such payments, above amount paid is retained by and forfeited to Louise Blair as liquidated damages. Purchaser agrees to purchase said property at above price and terms. Agent reserves the right to refund payment if unsatisfactory to owner. Dated this 30 day of May, 1948 at Los Angeles, California Clarence W. Coughlin Purchaser Agent John H. Blair Cathleen L. Coughlin Purchaser

*Per
I accept above sale and agree to pay commission of
Dated Owner"*
(Italics represent terms written in the blank spaces on the printed form.)

feet. It cannot be ascertained from the record whether or not these installations preceded the filing of the complaint; in any event, at that time about half only of the remaining 2525 feet of the road had even temporary paving and gas and electricity had not been brought to the lot. At the time of the trial, April 20, 1951, the road was in the same condition. No further work on the gas line was done until the week before trial, when workmen began laying a line in the direction of lot 7. Electricity was installed to a point adjoining lot 7 in August, 1950. There is nothing to show that plaintiffs requested or accepted performance after the complaint was filed.

Louise Blair was named as a defendant in the complaint, but died a few days before trial. Before her death she had conveyed to defendant Marion Conger real property of which lot 7 was a part, and Mrs. Conger agreed to assume Louise Blair's obligations to plaintiffs arising from the agreement of sale. The parties stipulated that the case should proceed with Marion Conger substituted as successor to Louise Blair. The trial court concluded that both defendants, John Blair and Marion Conger, were personally liable for the breach of the contract. Plaintiffs recovered judgment for \$9,500 general damages, the difference between the market value of the property on May 30, 1949, and the market value it would have had at that time had the contract been performed, \$2,300.37 special damages for the loss of use of the lot, measured by loss of use of the \$14,000 paid by plaintiffs and computed at 7 per cent from May 30, 1949, to the date of trial, and \$3,700 special damages for the increase of construction costs between June, 1949, and the date of trial.

Defendants appeal, contending: (1) John Blair is not personally liable for non-performance of the contract; (2) if the judgment against John Blair is affirmed, the judgment against Marion Conger must be reversed; (3) the award of damages is not sustained by the evidence and allows plaintiffs a double recovery; and (4) several material findings of the trial court are not supported by the evidence.

1. Liability of John Blair

[1,2] Defendant John Blair contends that he signed the contract as an agent only and is not personally liable thereunder. He relies on the rule that an agent who acts for a disclosed principal and is dealt with by the third party as an agent does not ordinarily incur personal liability. See, 2 Cal.Jur.2d, Agency, § 132, and cases cited. That rule is inapplicable here. If the fact of agency appears in an integrated contract, and there is no unambiguous expression of an intention either to make or not to make the agent a party thereto, extrinsic evidence is admissible to show the intention of the parties. Restatement, Agency, § 323(2); *Carlesimo v. Schwebel*, 87 Cal.App.2d 482, 488, 197 P.2d 167; *Otis Elevator Co. v. Berry*, 28 Cal.App.2d 430, 433, 82 P.2d 704; cf. *Patterson v. John P. Mills, etc., Inc.*, 203 Cal. 419, 421, 264 P. 759. In the present case the word "agent" appears before John Blair's signature to the contract and there is a blank following the word "owner." The reference to Louise Blair as the person who would receive the down payment as liquidated damages suggests that she is the principal. The words "Gas & Pavement & Elec. to be put at no cost to buyer within 1 yr from above date also to be surveyed by Jno H. Blair at once" indicate that the parties intended that John Blair should be personally liable for the surveying and also for installing the improvements. Thus, the contract gave plaintiffs notice that John Blair was an agent and indirectly disclosed the identity of the principal, but it also contains language indicating that he was to be liable as a party to the contract. Since it cannot be definitely ascertained from the instrument whether John Blair signed solely as an agent or personally assumed the obligation to perform the contract, extrinsic evidence was admissible to determine the intention of the parties. *Carlesimo v. Schwebel*, supra, 87 Cal.App.2d 482, 487-489, 197 P.2d 167.

[3] Plaintiffs conducted all negotiations with John Blair at the tract office, marked

with a sign "Blair Hills Estates." John Blair stated that "he would pave" the road to lot 7 and, in response to Mr. Coughlin's question regarding the time the utilities and pavement would be installed, stated "probably by September everything would be in shape because he had invested \$185,000 in bulldozing and he wanted to get started getting his money out of the tract so he was not going to lose any time in proceeding with the improvements in the tract." In the light of this evidence the trial court properly denied defendant John Blair's motion for a nonsuit. Evidence later adduced² also supports the trial court's determination that it was the intention of the parties that John Blair be personally liable for performance of the contract. Eugene Blair, who was the brother of John Blair and who acted as the latter's agent and received a commission on the sale of the lot, testified, "At the time of my deal with Mr. Coughlin it was no argument or discussion about the paving. Mr. Blair give them an agreement that he would pave it within a year. * * * Mr. Blair promised to put the gas and electricity in at a certain time, a certain time if he could do it. * * * Mr. Blair set it down in the form that I drew up and said in one year's time he thought he would have it all in."

2. Liability of Marion Conger

[4] Defendant Marion Conger contends that affirmance of the judgment against John Blair necessitates reversal of the judgment against her. She relies on several cases holding that a party suing on a contract may be forced to elect between a judgment against an undisclosed principal and a judgment against his agent. *Klinger v. Modesto Fruit Co., Inc.*, 107 Cal.App. 97, 100, 290 P. 127; *McDevitt v. Chas. Corriea & Bros.*, 70 Cal.App. 245, 254, 233

P. 381; *Ewing v. Hayward*, 50 Cal.App. 708, 717, 195 P. 970; *Contra: Montgomery v. Dorn*, 25 Cal.App. 666, 670, 145 P. 148; *Jewell v. Colonial Theater Co.*, 12 Cal.App. 681, 685, 108 P. 527; *McKee v. Cunningham*, 2 Cal.App. 684, 688, 84 P. 260; see, *Craig v. Buckley*, 218 Cal. 78, 81, 21 P.2d 430; *Restatement, Agency*, § 210(1); 39 Cal.L.Rev. 409. That rule is inapplicable here. The evidence discloses that John Blair was not only a party to the contract but that he also acted as an agent, and the deposit receipt at least indirectly identified Louise Blair as his principal. *Restatement, Agency*, §§ 144, 146, 184; see, *Geary St., P. & O. R. Co. v. Rolph*, 189 Cal. 59, 65-66, 207 P. 539. Even if we assume that Louise Blair was an undisclosed principal the trial court properly refused to require plaintiffs to make an election.

[5] At the outset of the trial it was stipulated that John Blair, in signing the agreement, "acted as agent for Louise Blair, that he had full authority to act as such agent, and that his act bound her." It was further stipulated that Marion Conger, as successor in interest to Louise Blair, deceased, "expressly assumes and agrees to pay and discharge any and all liabilities or obligations claimed or asserted by plaintiffs against defendants in the above entitled action, if and as adjudicated in this action." Counsel for defendants stated, "I stipulated [that this document] bound Mrs. Blair but I do not stipulate it bound Mr. Blair. He signed as agent and he is not bound except as agent." Counsel for plaintiffs replied, "I accept counsel's stipulation as far as it goes. We, of course, contend Mr. Blair was bound, that he acted not only as agent for his wife but also acted individually." Marion Conger's liability was conceded by the stipulation. She cannot now successfully contend that

2. Defendant John Blair stated at the close of plaintiff's case that he would "stand on his motion for a nonsuit" and would not introduce evidence on his behalf. Defendant Marion Conger introduced evidence to defend the action against her and, on cross-examination, plaintiffs elicited additional evidence supporting their case. That evidence may be considered

by an appellate court in reviewing the sufficiency of the evidence to support the trial court's determination that it was the intention of the parties that John Blair be personally liable for performance of the contract. See, *Peters v. Southern Pacific Co.*, 160 Cal. 48, 52-53, 116 P. 400.

Louise Blair was an undisclosed principal and that by obtaining judgment against John Blair plaintiffs elected to release her from liability. *Williams v. General Ins. Co.*, 8 Cal.2d 1, 5, 63 P.2d 289; *Stanton v. Santa Ana Sugar Co.*, 84 Cal.App. 206, 210, 257 P. 907. Plaintiffs were entitled to rely on the stipulation and to try the case on the assumption that it remained for them only to prove that John Blair was also liable.

3. Damages

Defendants contend that the trial court allowed plaintiffs excessive damages by awarding them \$9,500 general damages for the difference between the market value of the property with and without the performance due under the contract. Their first ground of attack is that plaintiffs failed to show that the injury was permanent. Defendants assert that they performed part of their obligations under the contract before the action came to trial and that they will perform the remainder of their obligations in the future. They conclude that since plaintiffs will thus have the improvements, they would be allowed a double recovery if they also recovered damages for failure to get the improvements.

[6] The distinction defendants would draw between a permanent and a temporary injury has no relevance in a case involving a total breach of contract. In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. *Abbott v. 76 Land & Water Co.*, 161 Cal. 42, 47-48, 118 P. 425; *Van Horne v. Treadwell*, 164 Cal. 620, 622, 130 P. 5; see, *Corbin on Contracts*, § 946. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. *Noble v. Tweedy*, 90 Cal.App.2d 738, 744, 203 P.2d 778. The judgment for damages is substituted for the wrongdoer's duty to perform the contract. *Restatement, Contracts*, § 313, Comment c; *South Memphis Land Co. v. McLean Hardwood Lumber Co.*, 6 Cir., 179 F. 417, 426.

If there was a total breach of contract, plaintiffs properly brought their action for all their damages, general and special;

since any subsequent action for additional damages would be successfully opposed by the plea of *res judicata*, plaintiffs' injury is necessarily permanent. It would be anomalous for a court in the very judgment that substitutes a money award for defendants' performance, and divests the court of the power in the future to require performance or to award additional damages for breach, also to determine whether or not the defendant will nevertheless render the performance from which he is absolved. Defendants rely on *Spaulding v. Cameron*, 38 Cal.2d 265, 239 P.2d 625, where we held that in an action to abate a nuisance a plaintiff could not recover both an injunction abating the nuisance and damages on the theory that the nuisance was permanent. That case would be in point here, if plaintiffs had obtained both damages for a total breach and a decree of specific performance requiring defendants to perform, or if defendants were still obliged to perform the contract. See, *Wichita Falls Electric Co. v. Huey*, Tex.Civ.App., 246 S.W. 692, 694-695.

[7-10] If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. See, *Ris- chard v. Miller*, 182 Cal. 351, 353, 188 P. 50; *Restatement, Contracts*, § 313. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. *Fresno Canal & Irrigation Co. v. Perrin*, 170 Cal. 411, 415, 149 P. 805; *Restatement, Contracts*, § 317(2). The circumstances of each case determine whether an injured party may treat a breach of contract as total. See, *American Type, etc., Co. v. Pack- er*, 130 Cal. 459, 463, 62 P. 744; *Clarke Con- tracting Co. v. City of New York*, 229 N.Y. 413, 419-420, 128 N.E. 241; *Helgar Corp. v. Warner's Features*, 222 N.Y. 449, 453-454, 119 N.E. 113; *Corbin on Contracts*, § 946. If, as in the present case, the injured party has fully performed his obligations under a bilateral contract, courts usually treat a breach as partial unless it appears that performance of the agreement is un- likely and that the injured party may be

protected only by recovery of damages for the value of the promise. *Gold Mining & Water Co. v. Swinerton*, 23 Cal.2d 19, 29-30, 142 P.2d 22; *Restatement, Contracts*, § 316.

Plaintiffs contend that there was a total breach on May 30, 1949, the date that performance was due under the contract. Even if plaintiffs could have treated the breach as total at that time, it is clear that they elected not to do so, for during the following year they kept urging defendants to perform.

[11, 12] A different situation was presented on May 24, 1950, when plaintiffs brought the present action. At that time performance was one year overdue. By seeking damages for the difference in the value of their property with and without performance, plaintiffs gave notice that they would no longer treat defendants' continued failure to perform as a partial breach. Defendants could not reasonably expect plaintiffs to continue indefinitely to treat the breach as partial. Even if a breach might be considered partial at the time performance is due, there is a limit to the time a promisee must thereafter await performance. The trial court could reasonably conclude that that limit was reached here. It was not shown that despite defendants' delay, plaintiffs would be assured of getting the improvements. Cf. *South Memphis Land Co. v. McLean Hardwood Lumber Co.*, 6 Cir., 179 F. 417, 426. Despite repeated requests by plaintiffs, defendants had not installed the improvements called for by the contract. It was uncertain when if ever they would do so. Although defendants had not expressly repudiated the contract, their conduct clearly justified plaintiffs' belief that performance was either unlikely or would be forthcoming only when it suited defendants' convenience. Plaintiffs were not required to endure that uncertainty or to await that convenience and were therefore justified in treating defendants' non-performance as a total breach of the contract. See *Gold Mining & Water Co. v. Swinerton*, *supra*; *Walker v. Harbor Business Blocks Co.*, 181 Cal. 773, 780-781, 186 P. 356; *Losei*

Realty Corp. v. City of New York, 254 N.Y. 41, 47, 171 N.E. 899.

[13, 14] The question remains whether the court applied a proper measure of damages. Unless a statute otherwise specifically provides, the proper measure of damages for the breach of a contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." *Civ.Code*, § 3300. Damages must, however, "be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered." *Civ.Code*, § 3359. In the present case the contract called for installation of improvements that would greatly increase the value of plaintiffs' property. The consideration was paid in advance. If the work were to be done on plaintiffs' property the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. *Taylor v. North Pac. Coast R. Co.*, 56 Cal. 317, 320; *Adams v. Hiner*, 46 Cal.App.2d 681, 683, 116 P.2d 630; cf. *Avery v. Fredericksen & Westbrook*, 67 Cal.App.2d 334, 336, 154 P.2d 41; see, *Corbin on Contracts*, §§ 1089-1091. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party. In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived. *Knoch v. Haizlip*, 163 Cal. 146, 154, 124 P. 998; *South Memphis Land Co. v. McClean Hardwood Lumber Co.*, 6 Cir., 179 F. 417, 423-424; *Hyatt v. Wiggins*, 178 Ark. 1085, 13 S.W.2d 301, 303.

[15] In the present case the contract was to be performed entirely on property that is not owned by plaintiffs. Plaintiffs did have a nonexclusive easement there-

over. Defendants, however, had reserved an easement and right of way over the road, with the right of "constructing, maintaining, repairing, and operating the same." Plaintiffs proved their damages on the theory that the proper measure was the difference in value of lot 7 with and without the promised performance. Defendants did not contend at the trial or on appeal that plaintiffs had the right to pave the road and install the gas line and electricity thereon, or that they would be able independently of defendants to get the improvements. In this state of the record, we are of the opinion that the trial court invoked the proper rule for measuring the general damages. Cf. *Herzog v. Grosso*, 41 Cal.2d 219, 259 P.2d 429.

[16] The question arises whether the measure of damages applied by the court includes a double recovery on the ground that it allows damages on the assumption that there had been no performance by defendants whereas plaintiffs got the benefit of defendants' part performance during the period plaintiffs treated the breach as partial. If there were no performance by defendants between May 30, 1949, and May 24, 1950, there can be no doubt that the award of \$9,500 damages was proper. If, on the other hand, defendants performed part of their contractual obligations to plaintiffs' benefit during the period that plaintiffs treated the breach as partial, defendants should be allowed credit therefor, since it would be manifestly unjust to allow plaintiffs to induce defendants to render such performance, and then to award plaintiffs damages as if it had not occurred.

The performance claimed by defendants breaks down into three activities: (1) at some time in the fall or winter of 1949, temporary paving was placed on 1225 feet of the road to the edge of lot 7; (2) at some unspecified date in 1950 permanent paving was installed on 1200 feet of the road to lot 7, commencing at the Nichols Canyon Road, leaving 1300 feet of the road with a dirt surface and the remaining 1225 feet of the road with temporary paving only; and (3) at an unspecified date in May of 1950 a gas line was installed over the

same 1200 feet of road, leaving a 2525 foot gap between the end of the line and plaintiffs' lot.

Insofar as installation of the temporary paving is concerned, the record discloses that the benefit thereof to plaintiffs was included in the valuations made of the property. Witnesses Holabird and Vollmer testified that they had viewed the property shortly before the trial and that their appraisals were predicated on the condition of the road as it then existed.

Plaintiffs contend that the amount of permanent paving and the amount of gas line installed did not enhance the value of the lot, on the ground that a gap of 2525 feet left the lot as useless and its value as unchanged as a gap of 3725 feet. The testimony of the valuation experts that without the improvements contracted for the lot was useless, lends some support to this contention. In any event, since it cannot be ascertained from the record whether or not defendants installed the permanent paving and the gas line over the 1200 feet of road before or after plaintiffs filed their complaint, we must conclude that defendants failed to establish that they were entitled to credit therefor on the ground that this work was performed during the time plaintiffs treated the breach as partial.

The next question presented is whether defendants should receive credit for performance after the complaint was filed and before the action came to trial. In addition to the installation of the 1200 feet of gas line and permanent paving, discussed above, defendants installed electricity to the edge of lot 7 in August of 1950, more than two months after the complaint was filed, and began laying gas lines at a point 2500 feet from the lot and in its general direction about a week before trial. It was not shown that it was certain that the gas line would be brought to the edge of the lot. Neither party introduced evidence to show by what amount the installation of electricity without performance of the other obligations of the contract increased the value of the lot. Did the trial court err in applying its measure of damages in the absence of such evidence?

[17, 18] Ordinarily this question does not arise. If the injured party accepts or urges performance by the promisor, he will not be allowed to obtain damages on the theory that performance has not been made. If the wrongdoer cannot induce the injured party to accept performance, he will ordinarily not perform. The record does not show why defendants chose to continue performance after the action was brought.³ Plaintiffs did not urge performance after the complaint was filed, and they could not prevent it. By commencing the action they fully and fairly informed defendants that instead of performance they sought money damages for the value of defendants' promise. Unless plaintiffs indicated that they were again willing to treat the breach as partial, the remedial rights provided by law were substituted for the rights under the contract. Restatement, Contracts, § 313, Comment c. Thereafter defendants were absolved from all duties under the contract to furnish improvements. Subsequent work to that end would not be performance of a contract then existent but would be entirely voluntary. If prompted by defendants' self interest in the sale of other lots, such gratuitous benefit, wholly speculative on the record, would not constitute unjust enrichment to plaintiffs. Parties who have totally breached a contract cannot force performance on the injured parties.

Defendants next contend that if the award of \$9,500 is upheld, the award for loss of use of the property \$2,300.37, and the award for the increase in building costs, \$3,700, must be reversed.

[19, 20] Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. *Coburn v. California Portland Cement Co.*, 144 Cal. 81, 84, 77 P. 771; *Noble v. Tweedy*, 90 Cal.App.2d 738, 745, 203 P.2d 778. Dam-

ages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract. *Civ. Code*, § 3300; *California Press Mfg. Co. v. Stafford Packing Co.*, 192 Cal. 479, 483, 221 P. 345, 32 A.L.R. 114; see, *Corbin on Contracts*, § 1007.

[21] Plaintiffs informed defendants at the time the contract was made that they were buying the lot as a site for a residence and that they needed the gas, electricity, and permanent paving installed within a year. Defendants were in the business of selling lots as residence sites and were fully aware of the consequences of delay in their performance. They knew that the lot was less valuable without than with the improvements, and that plaintiffs would be deprived of the use of the lot for building purposes so long as the contract was not performed. They also knew that an increase in building costs would add to the cost of the residence plaintiffs contemplated building on the lot. Had the contract been performed, plaintiffs would have had not only a more valuable lot than they now have but the use of that lot from the date performance was due for the erection of their residence. By defendants' breach of the contract, plaintiffs are not only left with a lot that is less valuable than it would have been had the contract been performed but they have been deprived of the use of the improved lot they bargained for and are faced with increased building costs that would have been avoided had the contract been performed. The award of damages for the difference in the value of the lot with and without the improvements compensates for the loss in the value of the lot. It does not compensate for the loss of use of the lot or the increased building costs. Accordingly, plaintiffs are entitled to damages for the loss of use⁴ and the increased building costs preceding the date they treated the breach as total, in addition

3. It is suggested in the briefs (but on the record this is entirely speculative) that defendants may have had contractual obligations to other purchasers of lots

or wished to increase the value of their unsold lots.

4. The trial court measured damages for loss of use at the rate of 7 per cent per

to the \$9,500. *Tally v. Ganahl*, 151 Cal. 418, 424, 90 P. 1049; *Henderson v. Oakes-Waterman Builders*, 44 Cal.App.2d 615, 617-618, 112 P.2d 662.

The trial court erred, however, by including in the award damages for loss of use and increase in building costs during the period between the date that the complaint was filed and the date of trial. Damages for delay during that period could be awarded only if defendants still had duties to perform. When plaintiffs filed their complaint, however, they elected to treat the breach as total and to substitute their remedies under the law for their rights under the contract. As we have seen, defendants were no longer obliged to perform and could not force performance on plaintiffs. Any delay in utilization of the property thereafter was chargeable to plaintiffs, not to defendants. See, *Bomberger v. McKelvey*, 35 Cal.2d 607, 614, 220 P.2d 729; *Atkinson v. District Bond Co.*, 5 Cal.App.2d 738, 745, 43 P.2d 867; *Richardson v. Davis*, 116 Cal.App. 388, 390, 2 P.2d 860. Defendants cannot be required to pay damages designed to give plaintiffs the benefit of their bargain as of the time of total breach, and also to pay damages because they did not thereafter do things they were no longer under any duty to do and for which they would get no credit.

[22] By its award of damages, the trial court in effect attempted to compensate plaintiffs for the delay between the time they were entitled to damages and the time they were actually awarded damages in the form of the judgment. Such compensation is ordinarily given in the form of interest. Under section 3287 of the Civil Code, interest could not be awarded here, since the amount of damages could not be ascertained except on conflicting evidence. *Lineman v. Schmid*, 32 Cal.2d 204, 212, 195 P.2d 408, 4 A.L.R.2d 1380.

The award for loss of use between the date of the complaint and the date of trial cannot, therefore, be sustained. Although, as we have seen, plaintiffs may recover damages for the amount that building costs

increased between the date specified for performance in the contract and the date that the complaint was filed, the only finding on the subject is that costs increased \$3,700 between the date that performance was due and the date of trial. A retrial on that issue is therefore necessary. *Royer v. Carter*, 37 Cal.2d 544, 551, 233 P.2d 539.

4. Findings of the trial court

[23, 24] Defendants contend that the evidence does not support the finding that the term "paving" in the contract was intended by the parties to be "permanent paving conforming to the specifications of the City of Los Angeles for that area" and that such paving was a "plant mix" of three inches of rock, sand, and asphalt." Extrinsic evidence was admissible to determine what the parties meant by "paving." Code Civ.Proc. § 1860; *Woodbine v. Van Horn*, 29 Cal.2d 95, 104, 173 P.2d 17; *Wachs v. Wachs*, 11 Cal.2d 322, 325, 79 P.2d 1085; *Snyder v. Holt Manufacturing Co.*, 134 Cal. 324, 328, 66 P. 311. Plaintiff Clarence Coughlin testified that defendant John Blair stated at the time that the contract was executed that the pavement would be "State specifications, asphalt with asphalt shoulders." An expert witness subsequently testified that "city specifications" in the area called for three inches of rock and gravel. During the expert's testimony, the trial judge stated to defendants' counsel, "The testimony, if I understand it, is it was to be paved according to the City's specifications." Counsel replied, "That is the testimony so far." It thus appears that the case was tried on the understanding that "state specifications" and "city specifications" were the same thing, and defendants cannot successfully contend on appeal that the finding is not supported by the evidence.

[25] Defendants next contend that the evidence does not support the finding that the difference between the market value of the property with and without performance of the contract was \$9,500. Expert witnesses called by plaintiffs so testified, but defendants attack their valuations on the

annum on the \$14,000 purchase price paid in advance. Neither party questions loss of use of the money as a proper

measure of damages for loss of use of the property. Plaintiffs did not appeal and defendants have claimed no prejudice,

ground that the witnesses said they would not change their estimates "if they knew that some respectable person was under obligation to install electricity, gas, and paving." The contention is without merit. The witnesses gave their valuations of the lot with and without the improvements. Their valuations of the lot with improvements necessarily contemplated the improvements called for by the contract installed by a responsible person. Defendants' objection goes, not to the soundness of the appraisal, but to the question discussed above, whether defendants can avoid liability for the difference in the value of the lot with and without improvements if they should complete the improvements some time in the future.

[26] Defendants contend that the evidence does not support the finding that, "The breach of said agreement by defendants was deliberate." That finding is material insofar as it bears on the question whether the breach was total or partial. Defendant John Blair admitted in his deposition, which was admitted in evidence and considered by the trial court in reaching its decision, that he did not make the deposit required by the gas company before it would extend its gas line to plaintiffs' lot, although he had the financial ability to make the deposit. He stated that the electricity was not installed because of a dispute between defendants and the city department of light and power over the interpretation of a contract between defendants and the city. At one point the city offered to install electricity to plaintiffs' lot without cost to defendants, if defendants would waive a claim to certain other rights under their contract with the city. Defendants would not agree. Defendants did not install permanent paving because they took the position that only temporary paving was required by the contract. It thus appears that defendants had the ability to perform the contract but for reasons they thought to their advantage refused to do so. The finding that the breach was "deliberate" is supported by substantial evidence.

[27] Defendants finally attack the finding that the "construction cost of a 'mini-

mum house' (i. e., a house built at minimum cost and having an area not exceeding 1500 square feet, the minimum building restrictions applicable to the lot purchased by plaintiffs) increased during the period from June, 1949, to the date of trial in the sum of \$3,750. Plaintiffs have suffered special damage resulting from the increase of construction costs on a 'minimum house' as above defined in the amount of \$3,750.00." Although, as previously pointed out, a new trial is required on this issue, the question may recur at the retrial and it is therefore necessary that we pass on defendants' contention.

There is testimony that the building costs of a "minimum house" had increased by \$3,750. Defendants contend, however, that there is no proof that the damages were foreseeable or that they were caused by their breach. Plaintiffs told defendant John Blair on the day that the contract was signed that they intended to build a "three bedroom, rambling house with a playhouse and swimming pool." It was testified that such a house would exceed 1,500 square feet. Defendants were thus informed of the use to which plaintiffs intended to put the property and the award of damages may not be attacked for lack of notice to defendants. Reliance Acceptance Corp. v. Hooper-Holmes Bureau, 139 Cal.App. 607, 613, 34 P.2d 762. Defendants contend that plaintiffs "never seriously contemplated building at all" and that, accordingly, plaintiffs failed to show that but for the breach, they would have taken advantage of lower costs. At the time the contract was signed, however, plaintiffs stated that they intended to build "the following spring," the time when performance was specified in the contract. Plaintiffs actually employed an architect in June, 1949, and received plans from him in the fall of 1950. The record sustains the conclusion that but for the breach plaintiffs would have been able to take advantage of lower building costs in June, 1950.

To the extent that it awards \$9,500 general damages with interest thereon and costs, the judgment is affirmed. To the extent that it awards special damages for loss of use of the property and special damages

resulting from the increase in building costs, the judgment is reversed, and the cause is remanded to the trial court to determine the damages resulting from loss of use of the property and from the increase in building costs between June 1, 1949 and May 24, 1950. Defendants are to bear the costs of this appeal.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., concur.



41 Cal.2d 639

In re KENTERA'S GUARDIANSHIP.

KENTERA v. BOESEL.

S. F. 18511.

Supreme Court of California.
In Bank.

Oct. 27, 1953.

Proceeding by a minor 14 years old for appointment of his paternal grandmother as guardian of his person, opposed by his mother. From an order of the Superior Court, San Francisco County, Warren Steel, J., denying the petition and directing petitioner to return to his mother, he appealed. The Supreme Court, Spence, J., held that the evidence was sufficient to support the trial court's finding that appointment of a guardian of petitioner's person was not necessary or convenient.

Order affirmed.

Schauer, J., dissented.

Prior opinion, 254 P.2d 960.

1. Guardian and Ward ☞13(1, 7)

Guardianship matters are special proceedings, and validity of orders therein must be determined from consideration of governing statutes.

2. Guardian and Ward ☞13(1)

The statutes governing appointment of minors' guardians, construed as whole,

require Superior Court to determine first whether sufficient cause, consisting of necessity and convenience, exists to warrant appointment, and if so, whether petitioner's nominee for appointment merits approval. Probate Code, §§ 1405, 1406, 1440.

3. Guardian and Ward ☞13(7)

If Superior Court initially finds, on petition for appointment of guardian of minor, that such appointment is not necessary or convenient, court should deny petition, whether made by a relative or other person on behalf of minor or by minor, if 14 years old. Probate Code, §§ 1405, 1406, 1440.

4. Guardian and Ward ☞13(4)

The filing of petition by 14 year old minor for appointment of guardian, as authorized by statutes, does not eliminate need for showing of necessity or convenience as basic ground for appointment, and such minor has absolute right to appointment of his nominee, if approved by court as suitable person, only after such showing to court's satisfaction. Probate Code, §§ 1405, 1406, 1440.

5. Guardian and Ward ☞9½, 10

A minor's ownership of property is ordinarily sufficient to support finding that appointment of guardian of his estate is necessary or convenient, and preference of minor over 14 years old as to who shall be appointed prevails over objection of any person, including minor's parent, if his nominee is found suitable by court. Probate Code, §§ 1405, 1406, 1440.

6. Guardian and Ward ☞13(8)

In proceeding by 14 year old minor for appointment of his paternal grandmother as guardian of his person, whether appointment of guardian was necessary or convenient was a matter for determination by trial court. Probate Code, §§ 1405, 1406, 1440.

7. Appeal and Error ☞989

The appellate court's function begins and ends with determination as to whether there is any substantial evidence supporting findings of trier of facts.

8. Guardian and Ward $\Rightarrow$ 13(4)

In proceeding by 14 year old minor for appointment of his paternal grandmother as guardian of his person, evidence was sufficient to support trial court's finding that appointment of such a guardian was not necessary or convenient. Probate Code, §§ 1405, 1406, 1440.

Marshall E. Leahy and John F. O'Dea, San Francisco, for appellant.

W. L. A. Calder and Lorne M. Stanley, San Francisco, for respondent.

John E. Anderton, San Francisco, as amicus curiae on behalf of respondent.

SPENCE, Justice.

This is an appeal from an order denying the petition of Richard Steven Kentera for the appointment of his grandmother as guardian of his person. Appellant contends that as a minor, fourteen years of age, he has an absolute right to have his nominee appointed as guardian of his person, provided that his nominee is found to be a suitable person. Respondent, who is the mother of appellant, contends that there must first be a showing of necessity or convenience for the appointment of a guardian. If no such showing is made, respondent asserts that the petition of the minor should be denied without regard to the fitness of the nominee. The statutory scheme sustains respondent's position.

Appellant's mother and father were divorced in 1939 and both remarried. By the terms of the divorce decree appellant's custody was vested in both parents, with physical custody in the mother. Since 1939 he has been living with his mother and following her remarriage, with her and his stepfather. There are three other boys in the family: the oldest was seventeen and is the stepfather's child by the former marriage; the two younger boys, nine and seven, are the children of the present marriage. In 1951 appellant, then aged fourteen, filed a petition for guardianship in which he nominated his paternal grandmother, Angelina Kentera, to be guardian of his person. He was at the time visiting

her in San Francisco during his summer vacation from school. Appellant's mother filed an opposition to his petition. After setting forth the facts entitling her to appellant's custody, she denied that he was in need of a guardian and she denied that the grandmother was a suitable person to serve as such. Appellant's mother alleged that the grandmother was about sixty years of age; that she lived with her husband, who is not related to appellant; that no young people resided in their home; that they operated a restaurant in San Francisco which consumed most of their time and attention; and that because of age and outside interests, the grandmother would not be able to supervise appellant properly and give him a proper home environment. Appellant's mother also alleged that in her own home, the four boys lived and played together, and that it would be in the best interests of appellant to remain with his mother.

After the hearing, the court entered an order denying appellant's petition and ordering him to return to his mother in Ukiah. The court found that since the divorce of his parents, appellant has been in the general physical custody of his mother; that he has lived in his mother's home practically his entire lifetime; that she was a fit and proper person to have his care, custody, and control, and that her home in Ukiah was a suitable place for him to live. The court also found that the grandmother was a fit and proper person to act as personal guardian but that the appointment of such guardian was not "necessary or convenient".

[1] Appellant challenges the order denying his petition. This denial was based on the last mentioned finding. Guardianship matters are special proceedings and the validity of orders must be determined from a consideration of the governing statutes. In *re* Guardianship of Salter, 142 Cal. 412, 413, 76 P. 51; In *re* Britt, 176 Cal. 177, 181, 167 P. 863.

[2-4] The following sections of the Probate Code are controlling. Section 1405 provides that the "superior court shall appoint a general guardian of the * * *

person or estate, of minors * * * *when- ever necessary or convenient* * * *." (Emphasis added.) Section 1406 states that the court, in making such appointment, is "to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare", and that where the child is a resident of this state and over fourteen years of age, "*he may nominate his own guardian* * * * *and such nominee must be appointed if approved by the court.*" (Emphasis added.) Section 1440 provides: "When it appears *necessary or convenient*, the superior court of the county in which a minor resides or is temporarily domiciled * * * may appoint a guardian for his * * * person or estate. The appointment may be made * * * on the petition of the minor, if fourteen years of age." (Emphasis added.)

These statutes, construed as a whole, require the trial court to proceed in the following manner: first, to determine whether sufficient cause (necessity or convenience) exists to warrant the appointment of a guardian; and second, if sufficient cause is found to exist, then to determine whether the nominee merits approval. If the court initially finds that the appointment of a guardian is not "necessary or convenient," then it should deny the petition whether it be made by a "relative or other person on behalf of the minor, or [by] the minor, if fourteen years of age." Prob.Code, § 1440. While the statutes give the fourteen-year-old minor the privilege of directly petitioning for the appointment of a guardian, such procedure does not eliminate the need for making the required showing of necessity or convenience as the basic ground for the appointment. It is only *after* such showing has been made to the satisfaction of the court that the law distinguishes between the fourteen-year-old and the younger minor, granting to the former the right to have his nominee appointed if approved by the court as a suitable person. Otherwise, in the case of the fourteen-year-old, the words "necessary or convenient" would be given no meaning, with the result that every minor attaining that age would have the

absolute right to select any fit person as his personal guardian regardless of the fitness of his natural parents. The statutory provisions were not intended to upset the normal relationship of parent and child or to disrupt normal family discipline by allowing the fourteen-year-old minor to withdraw from the family circle at his whim. In other words, sections 1405 and 1440 apply in every case of the appointment of a guardian of a minor in that there must be the initial showing of necessity or convenience; and it is only thereafter that the right of the fourteen-year-old minor to have his nominee appointed his personal guardian, if fit, may be said to be "absolute." Prob.Code, sec. 1406.

[5] Appellant relies on two groups of cases. The first group concerns the question of the appointment of a guardian for a minor's estate. Where a minor owns property, that fact is ordinarily sufficient to support a finding that the appointment of a guardian of the minor's estate is "necessary or convenient," and the preference of the minor, if fourteen years old, prevails over the objection of any person, including the parent, provided that the nominee is found to be suitable. In re Guardianship of Kirkman, 168 Cal. 688, 690, 144 P. 745; In re Estate of Meiklejohn, 171 Cal. 247, 248, 152 P. 734; In re Estate of McSwain, 176 Cal. 287, 288, 168 P. 117. While in two of these cases the matter of the appointment of a guardian of a minor's person was noticed, the court in neither instance passed upon the question. In the Kirkman case, appellant waived any objection as to the disposition of the personal guardianship claim, 168 Cal. 690-691, 144 P. 745-746; and in the McSwain case the issue of whether it was either "necessary or convenient" that a personal guardian should be appointed had become moot by the time the appeal was taken and was not decided, 176 Cal. 288, 168 P. 117.

The cases in the second group cited by appellant concern solely the appointment of a personal guardian for a minor. In two of these cases, the principal question involved was the jurisdiction of the court to appoint a personal guardian, and it does not ap-

pear that the question of whether there must be proof of necessity or convenience was presented. *Collins v. Superior Court*, 52 Cal.App. 579, 199 P. 352; *In re Guardianship of Kerr*, 29 Cal.App.2d 439, 85 P.2d 145. *In Re Guardianship of Burket*, 58 Cal.App.2d 726, at page 728, 137 P.2d 475, at page 477 the court observed that “* * there appears to be some doubt as to the necessity for such proof * * *” but it nevertheless held that the evidence in that case was sufficient to establish such necessity or convenience. *In Re Guardianship of Gianoli*, 60 Cal.App.2d 504, 140 P.2d 987, the court cited the *Burket* case with approval and held that the evidence there was likewise sufficient to establish “the necessity or convenience for the appointment.” 60 Cal. App.2d at page 507, 140 P.2d at page 988. If it may be said that any of these cases imply either that a minor of the age of fourteen years has the absolute right to the appointment of his nominee as his guardian in the absence of a showing of necessity or convenience, or that a mere showing that a minor has reached the age of fourteen years and has nominated a guardian compels a finding of necessity or convenience, such implication is out of harmony with the statutory scheme governing the appointment of a personal guardian and is hereby disapproved.

[6] As above stated, the court here found that the appointment of a guardian for appellant was not “necessary or convenient”. This was a matter for the determination of the trial court. As was said in *Guardianship of Hann*, 100 Cal.App. 743, at page 746, 281 P. 74, at page 75, where the court denied the petition of a sixteen-year-old minor: “It is provided in Code of Civ.Proc. § 1747 (now Prob.Code, § 1405), that the court may appoint a guardian for a minor ‘when it appears necessary or convenient.’ The court was not bound to appoint a guardian simply because the minor nominated one. *Newton v. Janvrin*, 62 N. H. 440. The court, not the minor, is required to decide whether a guardianship is necessary or convenient.”

[7,8] A review of the evidence bearing on the issue of necessity or convenience

shows that there is no merit in appellant’s attack upon the trial court’s finding. Both appellant’s mother and his stepfather testified at length as to the suitability of the home that they provided for appellant, the schooling and recreational facilities that he had, and the companionship that he enjoyed with the three other boys in the family. Their neighbors corroborated this testimony. Appellant acknowledged his strong affection for his mother, and his appreciation of her loving care, but he stated his dislike of his stepfather because of the latter’s alleged discriminatory treatment in settling disputes among the boys. The stepfather and mother both denied that such discrimination had ever been made, and both stated that all four boys were treated alike in an effort fairly to maintain the necessary family discipline. The appellate court’s function begins and ends with a determination as to whether or not there is any substantial evidence which will support the findings of the trier of fact. *Moran v. Bromley*, 112 Cal.App.2d 520, 521-522, 246 P.2d 1001; *Wells Fargo Bank & Union Trust Co. v. Brady*, 116 Cal.App.2d 381, 397, 254 P.2d 71. The foregoing brief summary shows that there was ample evidence to support the finding that it was not “necessary or convenient” that a guardian of appellant’s person be appointed.

The order is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER and TRAYNOR, JJ., concur.

SCHAUER, Justice.

I dissent.

In guardianship as well as in divorce proceedings the law, as enacted by the Legislature, requires that the courts give controlling effect to the best interests of the minor child. (Prob.Code, § 1405; Civ.Code, § 138.) The paramount issue in this case, if the law were followed, would be simply: Would the guardianship for which Richard petitions best serve his temporal and mental and moral welfare? (See Prob.Code, § 1406.)

If upon the evidence the best interests of the child would best be served by the ap-

pointment of a guardian of his person then it would follow as a matter of law that it was "necessary or convenient," within the meaning of section 1440 of the Probate Code, that a guardian be appointed. But by this decision the majority of this court advance another harsh step in their consistent and regrettable refusal to give effect to modern and enlightened legislation for child welfare. (See *Stewart v. Stewart* (1953), 41 Cal.2d 447, 260 P.2d 44; *Guardianship of Smith* (1953), Cal., 255 P.2d 761, 767-771 (rehearing granted); and *Roche v. Roche* (1944), 25 Cal.2d 141, 144-149, 152 P.2d 999.)

Again this court places reliance upon and follows the dark view that as against parents a child is a mere chattel. It cites *In re Guardianship of Salter* (1904), 142 Cal. 412, 76 P. 51, which in turn cites as its sole authority *In re Campbell's Estate* (1900), 130 Cal. 380, 62 P. 613. The *Campbell* case, as pointed out in my dissent in *Roche v. Roche* (1944), supra, 25 Cal.2d 141, 145, 152 P.2d 999, declares the governing theory that the parent's right to custody (and earnings) of a child is (page 382 of 130 Cal., page 614 of 62 P.) "like the right of the child in the father—a right vested in him for his own benefit, and of which it would be a personal injury to deprive him. The right must therefore be regarded as coming within the reason, if not within the strict letter, of the constitutional provisions for the protection of property. * * *" In truth, this court now aggrandizes the theory of the *Campbell* case: It holds that the petitioner child here is not even entitled to a hearing upon the question as to whether his temporal and mental and moral welfare will best be served by granting his petition but hastens to preserve the importance of property considerations by adding the statement that "Where a minor owns property, that fact is ordinarily sufficient to support a finding that the appointment of a guardian of the minor's estate is 'necessary or convenient,' and the preference of the minor, if fourteen years old, prevails over the objection of any person, including the parent, provided that the nominee is found to be suitable." The view I seek to emphasize is that the Legislature by its enactments has shown at least

equal concern for the "temporal and mental and moral welfare" of the child as for his property rights, yet this court while punctilious in upholding the latter, strikes down the former.

The *Salter* case, relied on here, says of *In re Campbell*, supra (pages 413-414 of 142 Cal., page 52 of 76 P.): "In that case, which was also a contest between maternal grandparents and a father for the guardianship of his infant son [incidentally, *under* the age of fourteen years], the lower court found that it was for the best interests—the temporal mental and moral welfare—of the minor that it be awarded to its grandfather. On appeal from such order this court, after pointing out that in an application for appointment of a guardian in a special proceeding such as the one at bar a court has no unlimited discretion to appoint a guardian for a minor other than the father, even if in its opinion the interest of the minor would be thereby subserved, proceeds to discuss the provisions of the code under which the applications in both that case and this were heard and disposed of. After referring to said [former] section 1751 [of the Code of Civil Procedure], * * * the court says, in reversing the order [quoting from page 383 of 130 Cal., page 614 of 62 P.]: '* * * the section is to be construed as if it read that the father or mother is to be appointed "if not found by the court incompetent," etc. The fact of competency or incompetency of the father was therefore the controlling question in this case; and as there is no finding on the point, the findings must be regarded as insufficient to support the order appealed from.'

"So in the case at bar the controlling question was the competency or incompetency of the father, and as the lower court expressly found that he was competent, that was the end of the matter, as far as the power of the court to appoint the grandmother as guardian was concerned, because the court was without authority, under the terms of section 1751, after finding the father competent, to appoint any other person than the father as guardian of his child.

"Nor is the right of the father, he being competent, to have the custody and control of his child at all affected by the finding of

the court relative to the health of the child, and the better opportunity he would have for fresh air and exercise at the home of his grandmother than at the residence of his father."

By the instant decision the court even denies to the minor the right to have the issue as to his best interests determined. In the Campbell and Salter and Roche and Smith and Stewart cases the court wrote into the statutes words which the Legislature had not inserted; here the court in effect strikes the words "or convenient" out of the statutory provision that "The superior court *shall* appoint a general guardian of the * * person or estate, of minors * * * whenever necessary *or convenient* * * *," (Prob.Code, § 1405; italics added.) It appears that the trial court did not think the word "convenient" had any significance in relation to the right of the petitioner. The record shows the court's statement in this regard: "Now, on the face of the record I cannot say that I find it necessary. It might always be convenient, but I cannot say that it is necessary by reason of anything that is occurring or has occurred where he [petitioner] now exists¹ insofar as the home of his mother is concerned."

The barest outline of the facts in this case—the placing of this boy in the home of his mother and stepfather with three other children, one of such children being older than petitioner and the child of his stepfather and the two others being younger and the children of his mother and stepfather, coupled with the boy's love for his own father and his father's mother—show a case which as a matter of law entitled him to have his petition determined on its merits. It could only be determined on its merits by finding whether his interests would best be served by the appointment of the guardian whom he sought. If the finding in this respect were favorable, and his nominee was a fit and proper person (as was found), then he was entitled to an order granting his petition. The mere conclusional finding (that because the boy had a place in the home of his mother and stepfather it was not "neces-

sary or convenient" to appoint a guardian for him) upon which the trial court and the majority here dispose of this case, begs the real issue. In fact, disposition of this case on that ground denies to Richard his day in court on the real issue.

For further and adequate discussion of this case reference is made to, and I adopt, the decision prepared for the District Court of Appeal by Justice Goodell and concurred in by Presiding Justice Nourse, reported at 254 P.2d 960.

The judgment should be reversed and the case tried on its merits.



120 Cal.App.2d 837

WEST INV. CO. v. MOORHEAD et al.

Civ. 19604.

District Court of Appeal, Second District,
Division 2, California.

Oct. 27, 1953.

Action for slander of title. The Superior Court of Los Angeles County, Julius V. Patrosso, J., entered a judgment dismissing the action and the plaintiff appealed. The District Court of Appeal, Fox, J., held that where action of slander of title is based upon a lis pendens notice, existence of successful termination of prior judicial proceeding in connection with which lis pendens notice was filed is an integral and indispensable element and should be alleged.

Order in accordance with opinion.

1. Libel and Slander ¶38(1)

Under statute declaring a publication made in a judicial proceeding to be privileged, pleadings filed to commence an action in a court, all subsequent communications of judge, counsel, jurors, parties, and witnesses in actual course of judicial pro-

¹Perusal of the entire record indicates that the use of the word "exists," rather than "lives," is probably accurate diction.

ceeding, are clothed with absolute privilege. Civ.Code, § 47, subd. 2.

2. Libel and Slander ⇨38(1)

Absolute privilege conferred by statute upon publication made in a judicial proceeding does not transcend limits of what may properly be characterized as judicial proceeding, and privilege will not attach to extrajudicial publications, related to the litigation, which are made outside purview of judicial proceeding. Civ.Code, § 47, subd. 2.

3. Libel and Slander ⇨136

Recordation of a notice of *lis pendens*, which was allegedly done with knowledge of falsity of claims involving realty which were asserted by person who recorded such notice, was not a "publication in judicial proceeding" within statute declaring a publication made in a judicial proceeding to be privileged, and *lis pendens* could be part of basis of action for slander of title. Civ. Code, § 47, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Publication in Judicial Proceeding".

4. Lis Pendens ⇨22(1)

Effect of a *lis pendens* is to give constructive notice of all facts apparent on face of pleadings and of those other facts of which facts so stated necessarily put a purchaser on inquiry.

5. Libel and Slander ⇨136

A rival claimant of property is conditionally privileged to disparage or justify in disparaging another's property in land by honest and good-faith assertion of an inconsistent legally protected interest in himself.

6. Libel and Slander ⇨139

Even as between rival claimants to property, a complaint which alleges communication or publication of matter falsely and maliciously disparaging plaintiff's title states a cause of action good as against general demurrer, but where complaint upon its face alleges that wrongful disparagement is predicated upon recordation of notice of *lis pendens* in connection with filing of prior legal action, plaintiff should also al-

lege termination, under conditions favorable to himself, of prior proceeding relating to defendant's claimed interest in disputed property.

7. Libel and Slander ⇨139

Where action of slander of title is based upon a *lis pendens* notice, existence of successful termination of prior judicial proceeding in connection with which *lis pendens* notice was filed, is integral and indispensable element and should be alleged.

Johnson & Reitz and Thomas F. McCue, North Hollywood, for appellant.

Randolph J. Soker, Youngdahl & Glick, Los Angeles, for respondents.

FOX, Justice.

Plaintiff appeals from a judgment of dismissal of its action for slander of title entered after a demurrer to its second amended complaint was sustained without leave to amend.

The material averments in plaintiff's second amended complaint recite that defendants maliciously entered into a conspiracy whose object was to impugn plaintiff's title to 155 parcels of real property by means of written and oral declarations calculated to cast clouds on said titles. The complaint alleges that pursuant to this conspiracy, defendant Moorhead filed an action on December 29, 1950, in the Superior Court of Los Angeles County, entitled "Paul G. Moorhead, Plaintiff, v. Safeway Homes, Ltd., a corporation, * * * West Investment Company, a corporation, et al., Defendants," Case No. 581468. In that action Moorhead, a defendant herein, is alleged to have fraudulently and falsely claimed to have certain rights and interests in about 155 parcels of property described in the complaint. On the same day the above action was initiated, defendant Moorhead's attorney, also a defendant herein, filed a notice of *lis pendens* in the office of the County Recorder.

The complaint alleges that both the filing of the action and the recording of the *lis pendens* referred to above was done with full knowledge of the falsity of the claims

asserted and with the intent that it would cause damage to plaintiff, who was then engaged in constructing dwelling houses and installing street improvements on all the said 155 parcels of property, and who had already conveyed title to all but 70 of the parcels described. Plaintiff further alleged that at the time the action was commenced and the *lis pendens* filed, defendants were acting maliciously pursuant to their conspiracy, with knowledge of the fraudulence of their claims, knowing well that plaintiff alone was the owner of the remaining 70 parcels, that it had contracted in writing to sell numerous of the remaining 70 parcels to various purchasers, for which escrows had been opened, and that the recordation of the notice of *lis pendens* would prevent plaintiff from performing its obligations under the sales contracts and would impair the vendibility of the said 70 parcels.

It is alleged that after discovering the above facts, plaintiff made numerous demands upon defendants to dismiss their action No. 581468 as to plaintiff and to revoke said *lis pendens* notice insofar as it related to plaintiff's 70 parcels, but that notwithstanding such demands defendants failed and refused to dismiss the action as to plaintiff and refused "to discharge, cancel, revoke or alter" the *lis pendens* notice until May 17, 1951. The complaint states that the filing and maintenance of the action and the recording of the *lis pendens* slandered plaintiff's title to the 70 parcels, constituted a malicious disparagement thereof, and both decreased their value and impaired their vendibility, causing damage to plaintiff in the sum of \$70,000. The remainder of the complaint recites in particular detail the specific items of damage included in the figure of \$70,000 which are alleged to have flown from the claimed malicious slander of title.

Defendants' demurrers to the second amended complaint were overruled, whereupon they filed their respective answers. Thereafter the court granted defendants' motion for reconsideration of their demurrers, and upon rehearing the demurrers were sustained without leave to amend.

Plaintiff appeals from the resulting judgment of dismissal.

In its argument in support of the judgment, defendants rely upon the reasons advanced by the trial court in dismissing plaintiff's complaint. These are: (1) the recordation of a notice of *lis pendens* is privileged as being a communication in the due course of a judicial proceeding. Civil Code, sec. 47, subd. 2; (2) in any event, the notice of *lis pendens* speaks only the truth and cannot form the basis of the present action. Neither of these arguments is tenable.

[1] Section 47 of the Civil Code reads in part: "A privileged publication * * * is one made— * * * 2. In any * * * judicial proceeding * * *." It is undisputed that under the statutory dispensation thus granted, pleadings filed to commence an action in a court, and all subsequent communications of the judge, counsel, jurors, parties, and witnesses in the actual course of the *judicial* proceeding, are clothed with absolute privilege.

[2, 3] But such absolute privilege does not transcend the limits of what may properly be characterized as judicial proceeding; it will not attach to extrajudicial publications, related to the litigation, which are made outside the purview of the judicial proceeding. Thus, the recordation of a notice of *lis pendens* is not an act in the course of a judicial proceeding within the meaning of the privilege conferred by Civil Code, section 47, subd. 2. No function of the court or its officers is invoked; no machinery associated with the judicial process is set in motion. It is merely a private act undertaken dehors the judicial proceeding for the purpose of calling to the attention of all the world the pendency of litigation affecting the designated real property. In *Coley v. Hecker*, 206 Cal. 22, 272 P. 1045, the court stated that the wrongful recording of an abstract of judgment was not a malicious abuse of process (thus indicating, in effect, that it was an act outside of the judicial proceeding), but rather was a slander of the owner's title in the same category as a forged deed. In *Gudger v. Manton*, 21

Cal.2d 537, 134 P.2d 217, 222, plaintiff prevailed in a slander of title action arising out of a levy and recordation of a writ of execution against a married woman upon her husband's separate property. On appeal it was contended that the levy of the execution was absolutely privileged as being an act in the due course of a judicial proceeding. To this argument the court replied: "The levy of a writ of execution is not an act in the course of a judicial proceeding. It is merely an endeavor to collect a judgment rendered in the judicial proceeding, and the acts of the public officials involved are merely ministerial." Similarly, the recording of a notice of *lis pendens* stands on a footing not different from the recording of an abstract of judgment, as in *Coley v. Hecker*, supra, or the levy and recordation of a writ of execution as in *Gudger v. Manton*, supra; that is to say, it is an act apart from the judicial proceeding itself and not invested with the privilege of section 47, subd. 2, of the Civil Code.

[4] Defendants' argument that the *lis pendens* itself contains no untruth and cannot be actionable is not only specious, but ignores the purpose and effect of the notice *lis pendens*. "The effect of a *lis pendens* is to give constructive notice of all of the facts apparent upon the face of the pleadings, and of those other facts of which the facts so stated necessarily put a purchaser on inquiry * * *." *Harris v. Whittier Bldg. & Loan Ass'n*, 18 Cal.App.2d 260, 266, 63 P.2d 840, 842. It carries the number of the case to which it refers, and has the practical effect of incorporating by reference the contents of the pleadings. In short, it constitutes a republication of the statements contained in the pleadings to all who are charged with notice thereof under circumstances not protected by the absolute privilege of a judicial proceeding. That a wrongful and malicious recording of a notice *lis pendens* might serve as the basis of a slander of title action, present other necessary elements of the tort and absent a valid privilege, is tacitly assumed in *Smith v. Stuthman*, 79 Cal.App.2d 708, 181 P.2d 123. In *New Orleans Land Co. v. Slattery*, 145 La. 256, 82 So. 215, plaintiff brought an action for slander of title based

on the filing of a *lis pendens*; a judgment for defendant was sustained on appeal only because it was found that defendant acted in good faith and with probable cause. It must be concluded, therefore, if defendants brought their suit against plaintiff maliciously and without an honest belief in the validity of their asserted claim, then it follows that liability for slander of title would attach upon the filing of the *lis pendens* notice.

[5] While the judgment of dismissal based upon sustaining the demurrer without leave to amend must be reversed for reasons to be later stated, we are not in agreement with plaintiff's contention that his complaint, in its present condition, states a cause of action. "A rival claimant of property is conditionally privileged to disparage or justified in disparaging another's property in land by an honest and good-faith assertion of an inconsistent legally protected interest in himself." *Gudger v. Manton*, supra, 21 Cal.2d at page 545, 134 P.2d at page 222; Rest., Torts, sec. 647. In filing a legal action in which he asserted a claim to an interest in plaintiff's land, defendant Moorhead became a rival claimant to an interest in the property. The recordation of the *lis pendens* notice in connection with that suit was therefore conditionally privileged if in initiating that litigation defendant Moorhead acted in good faith; such privilege, when not abused by the lack of good faith or the absence of an honest belief in the merit of the claimed right, would defeat the plaintiff's cause of action.

[6, 7] It is clear from the statements in the complaint that while plaintiff has alleged that defendant Moorhead filed his action in case No. 581468 maliciously and with knowledge of the falsity of his claims, it has nowhere alleged that such action was terminated in its favor. It is, of course, well settled that even as between rival claimants to property, a complaint which alleges that the communication or publication of matter falsely and maliciously disparaged plaintiff's title states a cause of action good as against a general demurrer. *Davis v. Wood*, 61 Cal.App.2d 788, 794-795, 143 P.2d 740. This is true under most cir-

cumstances where only the sufficiency of the complaint is involved, for when such allegations of malice and bad faith are taken at face value, they negative the conditional privilege enjoyed by the rival claimant. However, where a complaint upon its face alleges that the wrongful disparagement is predicated upon the recordation of a notice of *lis pendens* in connection with the filing of a prior legal action, a new and significant factor is injected into the situation. The plaintiff, who carries the burden of proving the abuse of a privileged occasion in the tort here under discussion, *Gudger v. Manton*, supra, 21 Cal.2d at page 543, 134 P.2d 217, should under such circumstances also allege the termination, under conditions favorable to himself, of the prior proceeding relating to defendant's claimed interest in the disputed property. For it is essential and salutary in such a case, if the effective administration of justice is to be promoted and the rights of both parties safeguarded, that the crucial question of defendant's claim of title be first disposed of in the main action, and a result favorable to the defendant therein be achieved, before a cause of action for wrongful disparagement stemming from such claim can lie. Since the action of slander of title based on a *lis pendens* notice bears a striking analogy to an action for malicious prosecution, the existence of a successful termination of the prior proceeding should be an integral and indispensable element when the tort assumes this character. Otherwise, litigants would be in a position to clog the avenues of the judicial process by filing an action for slander of title immediately upon the recording of the *lis pendens* notice, irrespective of the pendency of the action upon which said *lis pendens* was based. And the paradoxical possibility might exist whereby the plaintiff might prevail in the slander of title action, if perchance such action should be tried first in time, while in a subsequent trial of the other proceeding the rival claimant might fully establish the validity of his claimed interest.

It is patent that this consideration was the underlying rationale of the decision in *Thompson v. White*, 70 Cal. 135, 11 P. 564,

in which plaintiff brought an action for slander of title. When plaintiff presented his case, the evidence revealed that the title alleged to have been slandered was the subject of contention in a previously filed and pending suit. Thereupon the court held, in affirming a judgment of nonsuit, that a nonsuit is properly granted where the evidence shows that the existence of the title alleged to have been slandered is in dispute in a prior action between the parties brought for the purpose of determining their rights. The pleadings in the instant case also show the bringing of such a prior action, but make no mention of the disposition of the controversy. If such proceeding terminated in favor of the defendant, it would be fatal to the existence of plaintiff's cause of action herein. If it is still pending, it is premature to bring the present action, see *Thompson v. White*, supra, for the reasons already discussed.

The fact that under proper circumstances the action of slander of title may assume the complexion and coloring of an action for malicious prosecution is clearly recognized in other jurisdictions where the question has arisen. In the case of *Hurwitz v. Lotz*, 172 La. 27, 133 So. 351, 352, the Supreme Court of Louisiana stated: "An action for damages for slander of title, like a suit for damages for malicious prosecution, cannot be maintained if the act complained of was done without malice and was founded upon probable cause * * *." In the case of *Noble v. Johnson*, 180 Okl. 169, 68 P.2d 838, 841, the Supreme Court of Oklahoma stated: "To sustain an action for slander of title, or for malicious prosecution, there must be a want of probable cause. In that respect I think they should be put very nearly upon the same ground." These views are endorsed by the Texas court in *Humble Oil & Refining Co. v. Luckel*, Tex.Civ.App., 171 S.W.2d 902, 907. The similarity of the actions gains in identity when the slander of title action is grounded upon the recordation of a *lis pendens* notice. *New Orleans Land Co. v. Slattery*, 145 La. 256, 82 So. 215-216. Since malice or lack of good faith is the vital ingredient in defeating the conditional privi-

lege of a rival claimant, *Gudger v. Manton*, supra, plaintiff must be in a position to allege an adjudication or settlement of a prior action favorable to himself as an incident to his allegations of defendant's malicious disparagement of his title growing out of that action.

Since the necessity of alleging the favorable termination of the prior action does not appear to have been considered in the court below and since it may be possible for plaintiff to allege facts sufficient to state a cause of action in consonance with the views herein stated, the judgment is reversed with directions to grant plaintiff further leave to amend its complaint if it is so advised. The attempted appeal from the order sustaining the demurrer of defendants without leave to amend is dismissed. Each party shall bear his own costs on appeal.

MOORE, P. J., and McCOMB, J., concur.



121 Cal.App.2d 12

CHAGI v. CHAGI.

Civ. 19806.

District Court of Appeal, Second District,
Division 1, California.

Nov. 3, 1953.

Proceeding for modification of child custody provision of divorce decree. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered order denying change of custody and wife appealed. The District Court of Appeal, White, P. J., held that where trial court saw and interviewed witnesses and children involved, and concluded that welfare of children would, at present, be best served by continuing their custody with husband, trial court's order granting dismissal of wife's application was not an abuse of discretion.

Affirmed.

1. Divorce ⇐312.6(6)

District Court of Appeal on appeal from nonsuit entered in divorce proceeding involving custody of minor children was concerned only with whether evidence adduced by nonsuited party could properly be deemed by trier of fact, in exercise of sound judicial discretion, insufficient to justify change of custody, as in absence of showing of such an abuse of discretion, order of trial court must be upheld.

2. Divorce ⇐303(2)

Rule that until some change of circumstance arises which makes modification of former order of custody advisable from point of welfare of child involved, court will give effect to former order and will refuse to make any modification of such order is not iron-clad. Civ.Code, §§ 138, 197; Probate Code, §§ 1407, 1408.

3. Divorce ⇐303(3)

Where trial court saw and interviewed witnesses and children involved, and concluded that welfare of children would, at present, be best served by continuing their custody in husband, order denying petition for modification of child custody provision of divorce decree was not an abuse of discretion. Civ.Code, § 138.

Borah & Borah, Julius Borah, Los Angeles, for appellant.

Paul Gordon, Los Angeles, for respondent.

WHITE, Presiding Justice.

By the terms of an interlocutory judgment of divorce the cross-complainant husband was granted a divorce and custody of the minor children of the parties, with right of reasonable visitation by the wife. In October, 1952, approximately a year and a half after the entry of the interlocutory judgment, the wife procured an order to show cause why custody of the children should not be awarded to her. Upon the hearing of the order to show cause, plaintiff wife presented evidence in support of her application for change of custody. Upon conclusion of her evidence the trial court grant-

ed a motion for dismissal of her application, without prejudice. This appeal by the wife is from the minute order of the court granting the motion for dismissal and denying without prejudice the wife's application for modification of the custody order of February 19, 1951.

[1] Appellant presents as her grounds of reversal the proposition: "The plaintiff's evidence was legally sufficient to require the trial court to deny the motion for nonsuit." Thus, in effect, appellant contends that the evidence adduced did not support the trial court's conclusion that the best interests of the children would be served by continuing their custody in the father. In support of her argument, appellant invokes the well-established rules governing motions for nonsuit—that is, that the appellate court must view the evidence in the light most favorable to the party against whom the nonsuit is granted and draw from the evidence only those inferences which are favorable to the appealing party. The answer to this contention is that the court on appeal is concerned only with whether the evidence adduced by the wife could properly be deemed by the trier of fact, in the exercise of a sound judicial discretion, insufficient to justify a change of custody. In the absence of a showing of abuse of discretion, the order of the trial court should be upheld. *Crater v. Crater*, 135 Cal. 633, 67 P. 1049; *Lefebvre v. Lefebvre*, 48 Cal.App. 483, 192 P. 76; *Bernstein v. Bernstein*, 80 Cal.App.2d 921, 183 P.2d 43; *Robesky v. Robesky*, 74 Cal. App.2d 523, 168 P.2d 976; *Cowen v. Cowen*, 100 Cal.App.2d 366, 223 P.2d 666; *Exley v. Exley*, 101 Cal.App.2d 831, 225 P.2d 662; *Taber v. Taber*, 209 Cal. 755, 290 P. 36; *Davis v. Davis*, 41 Cal.2d 563, 261 P.2d 729.

[2] In *Foster v. Foster*, 8 Cal.2d 719, 726, 68 P.2d 719, 722, it was held that "until some change of circumstance arises which makes a modification of the former order of custody advisable *from the point of view of the welfare of the child*, the court will give effect to the former order and will refuse to make any modification of such order." (Emphasis added.) However, this rule is not iron-clad. *Foster v. Foster*, *supra*, 8

Cal.2d at page 728, 68 P.2d 723; see also *Kelly v. Kelly*, 75 Cal.App.2d 408, 415, 171 P.2d 95; *Peterson v. Peterson*, 64 Cal.App. 2d 631, 633, 149 P.2d 206; and limitations on the power of the superior court under Civil Code, sections 138 and 197, and Probate Code, sections 1407 and 1408, as judicially interpreted, where the question of "fitness" of a parent is involved, as discussed in *Stewart v. Stewart*, 41 Cal.2d 447, 260 P.2d 44.

The action for divorce was originally commenced by the wife in 1950. In December of that year the parties stipulated that the cause should be set on the "short cause" calendar for December 26; that the husband should be entitled to temporary custody of the children while the plaintiff was absent from the state, and that upon her return the parties "will attempt to mutually agree upon the custody" and upon their failure to agree the matter should be submitted to the court. The stipulation also provided for reasonable visitation by the plaintiff, her parents, and her brothers and sisters. By an amended stipulation of the same date, December 18, 1950, it was agreed that each parent should have custody for six months of the year, but that if the parent entitled to custody should be absent from the state, then the other parent should retain custody until the return to the state of the parent entitled to custody under the stipulation.

In February, 1951, an interlocutory judgment of divorce was granted to the husband, the parties having stipulated that the wife's complaint be withdrawn. The custody of the children was awarded to the cross-complainant husband, subject to reasonable visitation rights by the wife. A property settlement agreement between the parties was approved. In October, 1952, the wife sought modification of the custody award.

Prior to the entry of the interlocutory decree herein (February 21, 1951), the parties had gone to Mexico and secured a Mexican divorce, and immediately thereafter Mrs. Chagi went to the Canal Zone, where she married her present husband in a civil ceremony on February 10, 1951. Plaintiff-appellant returned to the United States with her present husband in June, 1952.

Appellant presents the following assertedly demonstrated facts as showing that her evidence "was legally sufficient to require the trial court to deny the motion for non-suit": (1) She had remarried; (2) because of her remarriage she had left the United States, but had now returned; (3) the paternal grandparents (with whom respondent husband and the children lived) were hostile; (4) respondent husband interfered with appellant's rights of visitation; (5) the attitude of the minor children warranted an inference that the grandparents were "conditioning the children to resist the affections of their mother"; (6) appellant intended to quit her employment if granted custody; (7) appellant had arranged to rent a two-bedroom home with den; (8) the children, girls aged 6 and 9, slept some of the time in a room with a 19-year-old boy; (9) one of the children had outgrown her shoes and had an inflamed toe, but was denied new shoes until the old ones had worn out; (10) appellant believed under the written stipulations above referred to that she would be entitled to custody upon her return to this country; (11) appellant's present husband, a physician, had severed his connections with the Army and planned to live in Southern California indefinitely; (12) the present husband was willing to have the children in his home and got along well with them; (13) the grandparents interfered with visitation by members of appellant's family; and (14) the grandparents made derogatory remarks concerning the mother in the presence of the children.

In addition, appellant directs attention to the language of section 138 of the Civil Code, providing that, other things being equal, the custody of a child of tender years should be given to the mother.

[3] As heretofore noted, the question here presented is not, as in the ordinary civil case, whether the evidence presented is of such substantiality as to require the defense to proceed and the cause submitted to the trier of fact. The sole question is whether, under the evidence presented by

the applicant for a change of custody, the trial court abused its discretion. No abuse of discretion appears. The trial court saw and heard the witnesses and interviewed the children. The trial court had before it, among other considerations, the fact that the wife had left the children with her husband in order to go to the Canal Zone and remarry before the interlocutory decree had been entered, and remained away for 15 months; that the children were satisfied in an established home with their father and paternal grandparents; that the wife and her present husband had not secured a suitable home, but proposed to do so; that the wife was employed, although she proposed to cease her employment if granted custody. The court did not find that the wife was unfit to have custody, but concluded that the welfare of the children would, at present, be best served by continuing their custody in the husband.

Appellant's reliance upon section 138 of the Civil Code is of no avail. Under that section, custody of a child of tender years should be awarded to the mother, "other things being equal." In the present cause, it is apparent that the trial court came to the conclusion that they were not "equal." The trial court could well conclude that the wife had failed to show that a suitable home had been established for the children and that in view of the children's attitude and their satisfaction with their situation with their father and grandparents, their welfare would not be served by a transfer of custody.

The case of *Stewart v. Stewart*, supra, relied upon by appellant, is not here controlling. While in the instant proceeding, as in the cited case, appellant has not been adjudged unfit to have custody, she is now seeking to take the children from the other parent, who is equally fit. The *Stewart* case involved a mother, not adjudged unfit, who sought to secure custody as against strangers.

The order appealed from is affirmed.

DORAN and DRAPEAU, JJ., concur.

PEOPLE v. MOORE. *

Cr. 4920.

District Court of Appeal, Second District,
Division 1, California.

Oct. 26, 1953.

Defendant was convicted of manslaughter. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction.

Affirmed.

1. Homicide $\S$ 250

Evidence sustained conviction for manslaughter.

2. Criminal Law $\S$ 1159(2)

Where there was substantial evidence to support verdict as a matter of law, court was without power to disturb judgment on grounds of insufficiency of evidence.

3. Criminal Law $\S$ 829(1) *

Where instructions, which were substantially equivalent to those requested by defendant and refused by court, were read to jury, no prejudice resulted from refusal of instructions.

4. Homicide $\S$ 339

In murder prosecution, where court excluded testimony, offered in support of theory of self-defense, that physician had found defendant in very run-down physical condition due to glandular disturbances which caused her to be emotionally unstable and that physician had reported such condition to defendant's husband, the victim, but reception of such testimony would not have changed outcome of trial, error, if any, was not prejudicial.

5. Criminal Law $\S$ 1166(1), 1169(1)

In murder prosecution, where prosecution played recordings which were made at instance of defendant and which consisted of conversations between defendant and her husband, the decedent, no motion was made to strike recordings, no objection was raised that recordings did not reflect entire

conversation, nor that recordings were inaudible or unintelligible, and defendant testified that a recording was fair transcription of what could be heard of what was done and said at time and that part played of other recording was true and fair recollection, no prejudice resulted from admission of recordings nor from ruling of court denying defendant's counsel right to hear recordings before they were played.

Ward Sullivan, Dockweiler & Dockweiler, Frederick C. Dockweiler, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Robert Wheeler, J. Miller Leavy, Deputy Dist. Attys., Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from the judgment and from the order denying defendant's motion for a new trial.

Defendant was charged by information with the crime of murder. The jury returned a verdict of manslaughter following a trial that required eighteen trial days.

The defendant and the victim of the murder were husband and wife.

[1] The facts in part, as recited in appellant's brief and which are supported by the record, are as follows:

"Appellant is a woman of some 41 years of age; that she married Dr. Moore on February 23, 1941, at Omak, Washington; that after his term of military duty they came to Southern California in 1946 where they subsequently purchased a home at 4106 Fulton Avenue, Sherman Oaks, California, and he opened up an office specializing in ophthalmology at 5061 Lankershim Boulevard, North Hollywood; both appellant and deceased had been married before, appellant being the mother of Antonia Thomas, known as Toni Moore, age 15 years, and Dr. Moore the father of Thomas Moore, age 16 years. As the result of their marriage there is a son, Telford I. Moore, Jr., known as Timmy,

* Subsequent opinion 275 P.2d 485.

age 8 years; appellant worked at her husband's office as a secretary and nurse under her maiden name of 'Miss Patricia Gallagher' as well as maintained their home and raised the children.

"From April, 1951, on the deceased started to abuse appellant physically and mentally. As a result of said abuse appellant had a breakdown and he sent her at various times to three psychiatrists, Dr. John D. Moriarity, Dr. Carl von Hagen and Dr. Alvin Gerty, who gave her 'shock' treatments. About this time Dr. Moore gave appellant large doses of sedatives and narcotics, in spite of admonitions from Commander Joseph O. M. Thatcher, also a doctor and a personal friend of the family. She repeatedly told her husband that she preferred to remain at home with the children, but because of the heavy medical practice of deceased he insisted on her remaining in the office, in spite of the warning of Dr. Harvey Billig, a personal friend whom she also consulted.

"Finally, in June of 1951, on the advice of Dr. von Hagen, she took a trip to Hawaii and remained there with her two children until July, 1951, at which time she returned home and discovered that her husband was associating with Mrs. Betty Blanchard. Because of appellant's knowledge of his activity, he further abused her, threatened to kill her, cursed her and inflicted great physical and mental suffering on her. About this time she met Robert T. Holroyd and Elton E. Sawyer, police officers, who installed a dictaphone in her home for the purpose of gathering evidence for a separate maintenance action which she filed through her attorney, Milton M. Cohen, on August 27, 1951, in the Superior Court of Los Angeles County. Subsequently, after a hearing, the Court made a decree ordering Dr. Moore out of the house, prohibiting him from molesting the appellant and ordering him to pay certain sums for the support of her as well as her child.

"In August of 1951 Officer Holroyd obtained the services of Dorothy Doir, a policewoman, who remained with appellant for several days, and Officer Sawyer gave her a revolver for her protection. After

many requests on the part of Dr. Moore, a reconciliation agreement was drawn and on December 7, 1951, they again assumed marital relations. In this agreement Dr. Moore gave appellant the home, as well as its furnishings, and remained with her until January 14, 1952, at which time he moved out. During the period of the reconciliation appellant discovered that her husband still continued his relationship with Betty Blanchard. After moving out of the house on January 14, 1952, deceased recorded a notice of rescission of the reconciliation agreement. On March 17, 1952, appellant, without funds for support, consulted Attorney Frederick Dockweiler, who thereafter advised and represented her in all further legal matters. Dockweiler had many conferences with Dr. Moore and in spite of repeated efforts he could never negotiate an amicable settlement of their domestic affairs; and in order to enforce the Court's order for appellant's support, on May 6, 1952, he obtained an order to show cause which was served on Dr. Moore by John F. Lydon, a private detective, and Albertine Jones, a personal friend. At the time of the service Dr. Moore was living at the Greenbriar Apartments, Hollywood, under the name of George M. Benson, and was found the evening of the service with Mrs. Blanchard. Upon returning home appellant endeavored to locate Don Blanchard, and being unable to do so she phoned other people who might know where Blanchard could be reached. She also called her attorney, Mr. Dockweiler, who was not home, and contacted Mr. Holroyd. She asked Mr. Lyden and Mr. Holroyd to go to the Blanchards and Mrs. Jones to continue to call and endeavor to reach Mr. Blanchard.

"At home that evening was Patricia Silvagni, a school-mate of her daughter, and her son Timmy Moore. Patricia informed appellant that Dr. Moore had called and while waiting for a telephone call from Attorney Dockweiler Dr. Moore phoned appellant and insisted on seeing her immediately for an interview. Appellant told him she did not want to see him. Fearing that he might assault her she procured the revolver that Officer Sawyer had given her for her protection and went downstairs to

open the door. He rushed through the house, running from the hall into the pantry, through the dining room, back into the hall, through the pantry and again into the dining room where he assaulted her with his fists, knocking her to the floor and rendering her momentarily stunned and unconscious.

"While in that condition the gun was discharged, the bullet striking a door and ricocheting into Moore's body. Unaware that the gun had been fired, and believing that her life was in danger, she tried to reach Timmy's bedroom upstairs. As she approached the stairs in the entrance hall she saw her husband coming toward her with his hands raised as though to assault her, whereupon she squeezed the gun, discharging a bullet which missed Moore but lodged in the wall. Moore fell mortally wounded at her feet."

The alleged offense was committed on the same day that the order to show cause was served on the husband and victim, May 6, 1952.

Incidentally, it should be noted that Mrs. Betty Blanchard did not appear as a witness. As stated in respondent's brief, "The People's inability to present Betty Blanchard at the trial was accounted for, she being out of the State at the time of the attempted re-service on her of a subpoena upon a continuance of a trial date."

Appellant's contentions on appeal relate to the insufficiency of the evidence, the introduction and exclusion of certain testimony and to certain instructions both given and refused.

[2] There is substantial evidence that the deceased had abused the defendant for a year preceding the offense. This abuse was both by words and physical assaults. For example a police officer, a friend and neighbor, lent defendant a revolver to use if necessary in self-defense. The officer also had a woman peace officer stay with defendant for a few days in an effort to remedy the situation. That the relations between defendant and deceased were severely strained there can be no question. A review of the record reveals that appellant's contention as to the insufficiency of the evidence is not without merit. There

were no eyewitnesses to the offense. Obviously the jury did not believe defendant's explanation as to the commission of the offense. The law on this subject is well settled and inasmuch as there is substantial evidence to support the verdict as a matter of law, the court is without power to disturb the judgment on such grounds.

With regard to the two instructions given by the court as requested by respondent and the two requested by defendant which were not given appellant argues that, "it is appellant's position, amply supported by the evidence, that decedent was the first aggressor and where the trial court, as it did in the instant case, instruct the jury from the viewpoint of and in a manner favorable to the prosecution, it became its duty to also instruct the jury from the viewpoint of and in a manner favorable to the appellant."

[3] In this connection, a reading of the instructions discloses that other instructions which were substantially equivalent to those requested by defendant and refused, were read to the jury and therefore the prejudice claimed by appellant could not have occurred.

[4] Appellant contends that the exclusion of testimony of a physician offered by the defense was prejudicial. In this connection appellant argues that, "In support of her theory of self-defense she sought to establish by the testimony of one Harvey Billig, a physician and surgeon, that during the year 1950 her husband had placed her under his care and treatment; that he had diagnosed her ailment, found her in a very run down physical condition due to glandular disturbances which cause her to be emotionally unstable, and that he had reported this condition to her husband. An objection to this testimony and offer of proof was sustained by the trial Court". The trial judge held, in effect, that such evidence was too remote. It is obvious from a review of the record that if such evidence had been received the outcome of the trial would have been the same. The contention is highly technical and it does not appear that, assuming that such ruling was error, it was prejudicial.

[5] In a supplemental brief appellant contends that, "The court erred in admitting into evidence tape recordings and re-recordings of tape recordings of conversations had between appellant and her deceased husband." In support of this contention appellant relies on the recent case of *People v. Stephens*, 117 Cal.App.2d 653, 256 P.2d 1033, 1038.

The facts incident to the installation of the equipment in defendant's home are recited in respondent's brief as follows:

"Between appellant and Holroyd the subject came up about getting a recording of Dr. Moore's abuse of her in their house. Her attorney had told her it would get her a 'good separate maintenance' if she could get a recording of some of the verbal abuse.

"Appellant asked Holroyd if he could make a recording of herself and Dr. Moore. He did not know if it would be legal. She talked to her attorney who said it would be legal. Holroyd told her he would see if he could find someone to do it. She wanted him to do that.

"About the recordings appellant wanted made Holroyd got in touch with Mr. Sawyer, a soundman police officer. Holroyd called appellant, told her Sawyer could do it; she said, 'Fine'.

"Elton E. Sawyer had had about nine years experience in 'sound work' as a police officer. He had been a City of Los Angeles police officer from December 1, 1943.

"About August 18, 1951 Sawyer first met appellant at the Moore's house, 4106 Fulton Avenue, Sherman Oaks. Appellant related to him some of her financial or matrimonial problems. She wanted him to record conversation between her and Dr. Moore between 7:00 and 8:00 o'clock in the morning, to have on record the names her husband was calling her and how he was abusing her physically. Sawyer and his partner agreed to install the sound equipment for appellant. Sawyer was to install one microphone under a refrigerator and another in appellant's bedroom. He used a tape recorder in his car alongside and about 35-40 feet from the house.' He

put the equipment in operation for two days between 7:00 and 8:00 o'clock in the morning. The recordings he got he delivered to appellant. In appellant's presence at the Moores' Sawyer spot-checked discs to show there was recording on the discs and then left them with appellant."

The recordings, People's Exhibits 38 and 42, were played to the jury. Appellant argues that, "It is apparent from the record on appeal that in numerous instances the recordings were either inaudible or unintelligible, such instances being indicated by the use of asterisks (* * *) in the Reporter's Transcript of the recordings."

In the *Stephens* case supra, the facts are somewhat different. In that case, "On one occasion, while the recordings were being played, a juror interrupted to inquire, 'Did he say "stole" or "sold" the car?' to which the court replied: 'You will have to get that from the record—I won't interpret'". And, as pointed out by respondent, "The fact that the reporter did not hear and transcribe all that was on the recordings does not afford the inference in the face of the record in the instant case, that the jury did not hear and understand what was played from the recordings." Moreover, as pointed out by respondent, "at the trial the circumstances of the conversations between appellant and decedent as shown by the recordings were disclosed in evidence. These recordings were admitted into evidence without objection from the appellant, no motion was made to strike all or any part of the recordings nor was any objection raised that the recordings did not reflect the entire conversation that took place; nor was any objection made that the recordings or any part of them, were inaudible or unintelligible."

On cross-examination of defendant the prosecuting attorney, referring to the "contents of the recording", asked the following question:

"Q. Very well. This is a foundation matter, if the Court please, during cross-examination.

"As a matter of fact, this is what was said, and this was your demeanor, a true and fair representation of your demeanor and conduct, as well as a true representation of

the demeanor and conduct of Dr. Moore.

"Now, if the Court please, I am going to ask that the recordings be played and the witness listen so as I can further cross-examine her as to whether, according to the question I have just asked, she can answer 'Yes' or 'No'."

The question was objected to on the grounds that there was no foundation, as defendant's counsel stated, "I feel we have a right to hear the recordings before they are played to ascertain whether or not they are subject to any objection." The objection was overruled. And, as recited in respondent's brief, "After the tape recording which is People's Exhibit No. 38 was played in Court, the appellant on cross-examination testified that she heard what was played in the courtroom, a recording of the transcription, People's Exhibit No. 38, and it was '* * * a fair transcription of what can be heard of what was done and said at that time'. She also testified that after the tape, she heard played in Court the record which is People's Exhibit No. 42 and that it was a true and fair recordation of the 'amount you played'."

From a review of the record relating to the evidence of the recordings, it does not appear that any prejudice resulted either as to the court's rulings or as to the substance of the evidence received.

After the record on appeal was lodged in this court, respondent obtained an order to augment the record by filing a supplemental transcript of the recordings made before the trial judge after the appeal was perfected. Appellant has made a motion to strike the supplemental transcript from the record. From the above testimony as given by the appellant, it is manifest that no prejudice resulted by reason of the augmentation of the record with the supplemental transcript.

Appellant's motion to strike the supplemental transcript is denied; and there being no prejudicial errors in the record, the judgment and order denying the motion for a new trial are affirmed.

WHITE, P. J., concurs.

DRAPEAU, Justice.

I concur.

This case has been reviewed with no little concern. The theory of defendant's innocence, advanced and argued with sincerity and earnestness by her counsel, is impressive and persuasive.

No one was present when defendant shot and killed her husband. Prior to the tragedy he had inflicted upon her grievous mental and physical suffering. She had a gun in her hand when she admitted him into her house; but she had good reason to be in mortal fear of him.

He rushed through the rooms like one demented. He struck her. Then she fired the first shot. She missed. But by an irony of fate the bullet struck a door and ricocheted into the man's body, piercing his aorta. As he kept on coming toward her, she fired a second shot, and missed him again. Then he fell, dead, at her feet.

On the other hand, the theory of the People is that defendant did not act in necessary self-defense; that when she knew her husband was coming, she armed herself, with the purpose of ending their marital troubles once and for all; that he did not see the gun in her hand when he entered the house; that when he did see the lethal weapon he turned in flight from its deadly menace; that while in flight she fired the two shots at him, with the deliberate purpose and intent of killing him.

There is substantial support in the evidence for this theory.

So whatever inferences we might draw from the record are not controlling. We are bound by the laws of this state, which put the duty of resolving conflicting evidence upon the jury which hears the testimony, and upon the judge who hears the motion for a new trial. When there is conflicting evidence, and substantial support for the verdict of a jury, a reviewing court has no power to upset the judgment.

121 Cal.App.2d 71

BURGESS v. RODOM et al.

Civ. 19412.

District Court of Appeal, Second District,
Division 2, California.

Nov. 4, 1953.

Action was brought to recover damages for breach of written contract to purchase realty. The Superior Court of Santa Barbara County, Atwell Westwick, J., entered judgment adverse to vendor, and vendor appealed. The District Court of Appeal, Fox, J., held that contract was unenforceable because incomplete with respect to terms on which balance of purchase price was to be paid.

Judgment affirmed.

1. Vendor and Purchaser ⇨21

Action for damages for breach of contract for purchase or sale of realty will not lie unless writing contains essential terms and material elements of agreement without recourse to parol evidence of intention of contracting parties.

2. Vendor and Purchaser ⇨1

The law does not provide a remedy for breach of an agreement to agree in future for sale of realty, and court may not speculate on what parties will agree.

3. Vendor and Purchaser ⇨21

It is indispensable to a valid memorandum of an agreement to sell and convey realty, that memorandum be complete evidence of terms to which parties have assented.

4. Vendor and Purchaser ⇨21

If memorandum of agreement to sell realty establishes that there was in fact no contract, or if it discloses that on essential and material terms, minds of parties did not meet and that such terms were left open for future settlement, then there is no binding obligation on either vendor or purchaser.

5. Vendor and Purchaser ⇨21

Written agreement of vendor and purchaser acknowledging receipt of \$200 by vendor as a deposit on purchaser's price and providing that \$5,000 balance should be

paid within 30 days and that terms of payment should be made as soon as new purchaser arranged for new mortgage presently held by bank was not binding on either vendor or purchaser because incomplete as to terms on which balance of purchase price was to be paid.

6. Vendor and Purchaser ⇨46

All provisions of deposit receipt relating to payment of purchase price of realty and terms should be read together.

7. Vendor and Purchaser ⇨49

In case of inconsistency between printed provisions of deposit receipt given in connection with sale of realty, and handwritten portion of receipt, handwritten portion would take preference over printed part. Code Civ.Proc. § 1862; Civ.Code, § 1651.

8. Evidence ⇨442(6)

In action to recover damages for breach of written contract to purchase realty, testimony was not admissible to establish terms, which were incomplete in written contract, and on which balance of purchase price was to be paid.

Elizabeth H. McCarthy, Los Angeles, for appellant.

Arden T. Jensen, Salvany, for respondent.

FOX, Justice.

Plaintiff seeks to recover damages for breach of contract to purchase real property. The demurrer of the defendant-vendee, Jane E. Rodom, to plaintiff's second amended complaint was sustained. Plaintiff declined to amend further. Judgment was accordingly entered that plaintiff take nothing. It is from this judgment that plaintiff appeals.

The agreement upon which the seller predicates his right of action acknowledges receipt of \$200 as a deposit on the purchase price of the property and provides that "The balance of the purchase price [\$5,000.] is to be paid within 30 days from date hereof, as follows, to-wit: *Terms to be made as soon as new purchaser arranges*

for new mortgage now held by Santa Ynez Valley Bank to Burgess (the seller)." The italicized portion of the agreement was inserted by handwriting in the blanks in a "deposit receipt" (California Real Estate Association Standard Form), which was signed by the plaintiff and defendant Jane E. Rodom but not signed by her husband, George.

Respondent contends that the agreement is lacking in essential elements and is fatally uncertain. Hence no cause of action is stated. Her position is well founded.

[1-4] An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains the essential terms and material elements of such an agreement without recourse to parol evidence of the intention of the contracting parties. *Salomon v. Cooper*, 98 Cal.App.2d 521, 522-523, 220 P.2d 774; *Dillingham v. Dahlgren*, 52 Cal. App. 322, 326-327, 198 P. 832. The law does not provide a remedy for breach of an agreement to agree in the future, and the court may not speculate upon what the parties will agree. *Autry v. Republic Productions, Inc.*, 30 Cal.2d 144, 151, 152, 180 P.2d 888; *Vangel v. Vangel*, 116 Cal.App. 2d 615, 631, 254 P.2d 919. Hence, as pointed out in *Salomon v. Cooper*, supra, 98 Cal. App.2d page 523, 220 P.2d page 775: "It is indispensable to a valid memorandum of an agreement to sell and convey land that it be complete evidence of the terms to which the parties have assented. If it establishes that there was in fact no contract, if it discloses that upon essential and material terms the minds of the parties did not meet and that such terms were left open for future settlement, then there is no binding obligation upon the seller to convey or the buyer to accept and pay for the land. It will be regarded as merely an inchoate effort. Implications will not be indulged. [Citations.]"

[5] Applying these principles, it is clear that the deposit receipt is incomplete in one essential feature, viz., the terms upon which the balance of the purchase price is to be paid. The deposit of \$200 represents only approximately four percent of the purchase

price. It appears to have been contemplated that the remaining 96 percent would be partially financed through a new mortgage at the bank and some other arrangements made for paying or securing the balance. Hence, the handwritten insertion of the provision: "Terms to be made as soon as new purchaser arranges for new mortgage now held" by the bank. How this balance would be paid, whether in monthly, quarterly, semi-annual or annual installments, or at the end of a specified term of years does not appear. Likewise, absent is the rate of interest. The security, if any, to be provided for this balance, whatever it might be, is not specified. These are all important items, yet agreement with respect to each of them was "left open for future settlement." It is therefore established from the language which the parties painstakingly wrote into the blank space in the deposit receipt that their minds had not met upon these essential and material terms of the deal. They had simply agreed to agree upon terms in the future. In such circumstances there was no binding obligation upon the buyer to accept and pay for the land. *Salomon v. Cooper*, supra; *Dillingham v. Dahlgren*, supra; *Wineburgh v. Gay*, 27 Cal.App. 603, 605, 150 P. 1003.

The decision in *Kline v. Rogerson*, 80 Cal.App.2d 158, 181 P.2d 385, is particularly pertinent here. It is stated in 80 Cal. App.2d on page 160, 181 P.2d on page 387 that "The deposit receipt signed by defendant did not constitute an agreement of purchase and sale by the parties since it expressly provided that the balance of the purchase price was to be paid 'at \$5,000 or more per year, plus interest at 5% or terms to mutual satisfaction'. Since the parties never agreed upon terms which were mutually satisfactory, there was never an agreement of purchase and sale."

[6,7] Plaintiff suggests that the contract calls for payment in cash in 30 days. He would treat as surplusage the handwritten addition. This, of course, he is not at liberty to do. Not only must all the provisions of the deposit receipt relating to payment and terms be read together, but in case of inconsistency the handwritten portion takes precedence over the printed

part. Code Civ.Proc. § 1862; Civ.Code, § 1651; Body-Steffner Co. v. Flotill Products, 63 Cal.App.2d 555, 561, 147 P.2d 84.

[8] Plaintiff offers to supply the absent elements of an enforceable agreement by proving that respondent arranged for a loan at the bank for \$2,200; that she had more than \$2,800 in her account (but not in the escrow) at the bank; and that she moved into the property, remaining for about three weeks and moving out because of alleged misrepresentations relative to its construction. Such proof would be *aliunde* the writing and is not admissible for the purpose of establishing an essential and material feature of the abortive agreement. *Salomon v. Cooper*, supra; *Dillingham v. Dahlgren*, supra; *Wineburgh v. Gay*, supra.

In view of our conclusion that no cause of action is stated it becomes unnecessary to consider other questions raised by counsel.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.



120 Cal.App.2d 811

In re THATCHER'S ESTATE.

THATCHER v. KUCHEL, Controller.

Civ. 19616.

District Court of Appeal, Second District,
Division 2, California.

Oct. 26, 1953.

Petition to recover proceeds of escheated property. The Superior Court, Los Angeles County, Stanley N. Barnes, J., entered judgment of dismissal, predicated upon ground that action had not been brought to trial within five years after date of filing thereof, and plaintiffs appealed. The District Court of Appeal, McComb, J., held that where attorney for

state, after expiration of five-year period entered into stipulation permitting trial of action, action would not be dismissed because of passing of five-year period.

Order of dismissal reversed.

1. Dismissal and Nonsuit ⇨60(6)

Trial court is not deprived of jurisdiction of action by mere lapse of five-year period from time of filing, where parties enter into stipulation permitting trial of action prior to actual order of dismissal. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⇨60(6)

Where attorney for state, after expiration of five-year period from date of filing action to recover proceeds of escheated property, entered into stipulation permitting trial of action, action would not be dismissed because of passing of five-year period. Code Civ.Proc. § 583.

3. Attorney General ⇨6

In action to recover proceeds of escheated property, Attorney General had authority to waive dismissal provision of statute requiring actions to be brought to trial within five years from date plaintiff filed action. Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⇨60(1)

Provisions of statute requiring action to be brought to trial within five years after plaintiff has filed action are merely procedural. Code Civ.Proc. § 583.

5. States ⇨190

When state enters court as litigant, it is bound by general rule of practice and procedure established for proper functioning of courts in discharge of their duties, same as any other litigant.

6. Dismissal and Nonsuit ⇨60(1)

Statute providing for dismissal of actions for failure to bring action to trial within five years of date plaintiff filed action is applicable to action where state is party. Code Civ.Proc. § 583.

7. States ⇨119

Where state through Assistant Attorney General entered into stipulation permitting trial of action to recover proceeds of escheated property after expiration of

five-year period from date action was filed, state was bound by stipulation notwithstanding constitutional provision prohibiting Legislature from making gift of public money or things of value belonging to state. Const. art. 4, § 31; Code Civ.Proc. §§ 583, 1460 et seq.

8. Appeal and Error ⇨712

In absence of showing in record that deputy in Attorney General's office who entered into stipulation allowing trial of action to recover proceeds of escheated property after expiration of five-year period from date of filing of action was not familiar with record in case, District Court of Appeal would not consider states argument based on such theory. Code Civ. Proc. § 583.

9. Appeal and Error ⇨712, 837(10)

Appellate court cannot consider facts which do not appear in record and which were not before trial court.

Stead & Boileau, Pomona, for appellants.

Edmund G. Brown, Atty. Gen., Edward Sumner, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of dismissal predicated upon the ground that the action had not been brought to trial within five years after the date of the filing thereof, plaintiffs appeal.

Plaintiffs are the sons of A. D. Thatcher who died in 1920. In 1946 a bank account belonging to A. D. Thatcher, and unknown or forgotten by his survivors, was placed in the custody of the Controller of the State of California pursuant to the Abandoned Properties Act (see Title 8A of the Code of Civil Procedure, repealed in 1951 and Title 10 enacted in lieu thereof).

Chronology

i. May 24, 1947, a petition to recover proceeds of escheated property was filed in the superior court, County of Sacramento.

ii. June 18, 1947, an answer was filed by respondent.

iii. June, 1947 to March, 1951, appellants, through their attorneys, conducted extended negotiations attempting to settle the claim. At the request of the respondent for further identification of the account, the appellants contacted persons connected with the bank, and who knew the family at the time of A. D. Thatcher's death. The information obtained was submitted to respondent in affidavit form.

iv. May 10, 1951, the parties stipulated that the cause be transferred to the County of Los Angeles.

v. July 11, 1951, the cause was transferred to the County of Los Angeles.

vi. July 23, 1951, the cause was set for trial on January 25, 1952.

vii. January 25, 1952, the cause was ordered off calendar subject to being reset after 30 days at request of plaintiffs because of the illness of one of the petitioners.

viii. May 24, 1952, the five-year period from date of filing expired.

ix. July 30, 1952, a stipulation for hearing on October 17, 1952, was agreed to, prepared, and signed by the attorneys for the parties.

x. September 30, 1952, the stipulation for hearing was filed.

xi. October 17, 1952, a motion by respondent for dismissal was granted.

Questions: First: Was the stipulation of July 30, 1952, sufficient to extend the five-year period granted to plaintiffs within which to bring their action to trial?

Yes. Section 583 of the Code of Civil Procedure reads in part as follows: " * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, *except where the parties have filed a stipulation in writing that the time may be extended* and except where it be shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff

and not discoverable to said plaintiff upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period. * * *

(Emphasis added.)

On May 24, 1952, the five-year period expired within which the action could be tried unless a stipulation in writing were filed permitting its trial thereafter. On July 30, 1952, the following stipulation by the attorneys for plaintiffs and the attorney general for defendant was filed: "Comes now E. Burdette Bioleau of Stead and Bioleau, attorneys for the plaintiffs, and Edward G. Brown by Edward Sumner, attorneys for the defendant, and stipulate that the above-entitled matter may be heard as a short cause matter at 9:15 A.M. or as soon thereafter as may be heard in Department One of the above-entitled court in the Courthouse in Los Angeles, California, on October 17, 1952. Dated this 30 day of July, 1952."

"Dated this 30 day of July, 1952.

"Stead and Bioleau

"By E. Burdette Bioleau

"Attorneys for Plaintiffs

"Edward G. Brown

"By Edward Sumner

"Attorneys for Defendant By W.E.J."

[1,2] This rule is therefore applicable: The trial court is not deprived of jurisdiction under section 583 of the Code of Civil Procedure by the mere lapse of the five-year period, and the matter of going to trial remains subject to the stipulation of the parties until an actual order of dismissal is made, and where the parties make a stipulation that the case may be set for trial, even though such stipulation is made more than five years after the action was filed, it is error to grant a motion to dismiss the action for failure to bring the same to trial. (Smith v. Bear Valley, etc., Co., 26 Cal.2d 590, 591 et seq., 160 P.2d 1; Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 5 [3], 200 P. 616; Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 640 [2] et seq., 116 P.2d 458; Koehler v. Peckham, 11 Cal.App.2d 481, 483 [1], 54 P.2d 500.)

It is clear that under the foregoing rule the trial court erred in granting the motion to dismiss.

[3] Second: *Did the attorney general have authority to waive the dismissal provision of section 583, Code of Civil Procedure by signing the stipulation that the cause might be tried after the five-year period had elapsed?*

[4] *Yes.* The provisions of section 583, Code of Civil Procedure are merely procedural. (Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122 [2] et seq., 47 P.2d 716.)

[5] It is likewise settled that when the state enters the court as a litigant, it is bound by the general rule of practice and procedure established for the proper functioning of the courts in the discharge of their duties the same as any other litigant. (Superior Oil Co. v. Superior Court, 6 Cal. 2d 113, 118 [5], 56 P.2d 950.)

[6] Also it has been held that the provisions of section 583, Code of Civil Procedure are applicable to an action where the state is a party. (Bank of America Nat. Trust & Savings Ass'n v. Superior Court, 84 Cal.App.2d 34, 35 [1], 189 P.2d 799.)

[7] Clearly therefore, the state was bound by the stipulation it entered into through the attorney general, and there is no merit in defendant's contention that he was without authority to do so because of the provisions in Article IV, Section 31, of the State Constitution, which prohibits the Legislature from making a gift of public money or things of value belonging to the state.

[8,9] Neither can we consider defendant's argument that the deputy in the attorney general's office who signed the stipulation was not familiar with the record in the case, since it is elementary that an appellate court cannot consider facts which do not appear in the record and which were not before the trial court. (Brodie v. Barnes, 56 Cal.App.2d 315, 319 [2], 132 P.2d 595.)

In the present case there is nothing in the record to support defendant's claim

that the deputy attorney general, who signed the stipulation was not thoroughly conversant with all the facts pertaining to the matter, nor was any such evidence or record presented, made or offered in the trial court.

The order of dismissal is reversed.

MOORE, P. J., and FOX, J., concur.



120 Cal.App.2d 890

Ex parte DU BOIS.

Cr. 2494.

District Court of Appeal, Third District,
California.

Oct. 28, 1953.

Proceeding in the matter of an application for writ of habeas corpus brought by a petitioner who was confined by sheriff pursuant to order of the Superior Court, Stanislaus County, R. R. Sischo and H. L. Chamberlain, JJ., finding petitioner to be in contempt of court for wilfull failure to comply with an order made in a pending divorce action directing petitioner to make certain payment for support of petitioner's wife and minor children. The District Court of Appeal, Van Dyke, P. J., held that affidavit was insufficient to invoke jurisdiction of court to punish for alleged contempt, and that contempt order entered by court following hearing was void.

Order in accordance with opinion.

1. Contempt ☞67

Habeas Corpus ☞22(2)

Jurisdiction of a court to punish for constructive contempt of court may be inquired into either on certiorari or in habeas corpus.

2. Certiorari ☞64(2)

Habeas Corpus ☞94

Scope of inquiry which court can make upon either habeas corpus or certiorari ex-

tends to jurisdiction of court to pronounce judgment rendered.

3. Contempt ☞40

Contempt of court is a criminal offense and proceeding to find a person guilty of contempt of court is not a civil action but is a separate proceeding of a criminal nature and summary character.

4. Contempt ☞54(4)

No intendments or presumptions may be indulged in to aid sufficiency of affidavit required by statute as basis of a proceeding to punish for constructive contempt of court.

5. Contempt ☞54(4)

Affidavit provided for under statutory provision that when alleged contempt of court is not committed in immediate view and presence of court, or of judge or justice at chambers, an affidavit shall be presented to court or judge of facts constituting alleged contempt, is fatally defective if it fails to allege that accused had notice or knowledge of existence of court order at time accused allegedly violated order.

6. Contempt ☞54(4)

Absence of essential facts, existence of which are necessary to be shown in affidavit as a condition precedent to exercise of jurisdiction to proceed in proceedings to punish for constructive contempt of court, cannot be cured by proof upon hearing.

7. Divorce ☞269(10), 311

Where affidavit in proceeding in contempt initiated by affidavit filed by attorney for wife of person claimed to be in constructive contempt of court for failure to comply with support order entered in pending divorce action, recited making of support order and failure to make payments directed thereby, and affidavit failed to allege notice or knowledge of making of order on part of accused or that accused had been able to make required payments, affidavit was insufficient to invoke jurisdiction of court to punish for alleged contempt, and contempt order entered by court following hearing was void.

Sutter, Elledge & Carter, Modesto, for petitioner.

Morton L. Silvers, San Francisco,
Jeremy Cook, Turlock, for respondent.

VAN DYKE, Presiding Justice.

By an order made in a pending divorce action, petitioner, John Jay DuBois, was directed to make certain payments for the support of his wife and minor children. Based on an affidavit setting forth that he had failed to do so, an order to show cause why he should not be adjudged in contempt of court was issued. At the commencement of the hearing petitioner moved to dismiss the contempt proceedings on the ground that the affidavit in support of the issued order to show cause was insufficient to give the court jurisdiction to proceed. This motion was denied. After the hearing the court found that petitioner had wilfully failed to comply with the support order, having the pecuniary ability to comply therewith. The court therefore adjudged him to be guilty of contempt and fixed his punishment at imprisonment in the county jail for the period of five days. Upon order of the court the sheriff confined petitioner, pursuant to the said judgment. He applied to this Court for a writ of habeas corpus, which was issued and the matter has been heard and submitted for decision.

[1-6] The jurisdiction of a court to punish for constructive contempt may be inquired into either on certiorari or in habeas corpus. In *re Lake*, 65 Cal.App. 420, 224 P. 126; In *re Drew*, 188 Cal. 717, 207 P. 249. The scope of the inquiry which the court can make upon either habeas corpus or certiorari extends to the jurisdiction of the court to pronounce the judgment rendered. Contempt of court is a criminal offense. In *re Lake*, supra, 65 Cal.App. at page 425, 224 P. 126, and cases cited. The proceeding is not a civil action, but is a separate proceeding of a criminal nature and summary character. *Id.* "No intentions or presumptions may be indulged in to aid the sufficiency of the affidavit required by section 1211 of the Code of Civil Procedure as the basis of a proceeding to

punish for constructive contempt. [The cited section provides that "When the contempt is not committed in the immediate view and presence of the court, or of the judge or justice at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt".] Such an affidavit is fatally defective if it fails to allege that the accused had notice or knowledge of the existence of the order at the time he is claimed to have violated it." *Phillips v. Superior Court*, 22 Cal.2d 256, 257-258, 137 P.2d 838, 839. "'It is settled law * * * that * * * the absence of essential facts, the existence of which are necessary to be shown in the affidavit as a condition precedent to the exercise of jurisdiction to proceed in contempt, cannot be cured by proof upon the hearing. Having failed to acquire jurisdiction, the court had no authority to proceed to a hearing at all.'" *Frowley v. Superior Court*, supra [158 Cal. 220, 110 P. 817]. Under such circumstances the proceeding is void ab initio. *Ex parte Von Gerzabek*, 63 Cal.App. 657, 219 P. 479."

[7] Applying the above decisions to the record as presented here we note the following: The proceeding in contempt was initiated by an affidavit filed by the attorney for Mrs. DuBois in the divorce action. The affidavit recited the making of the support order and the failure to make the payments thereunder. It failed to allege notice or knowledge of the making of the order on the part of petitioner or that petitioner had been able to make the required payments. The affidavit was completely insufficient to invoke the jurisdiction of the court to punish for the alleged contempt and the contempt order following the hearing was therefore void.

Petitioner is discharged from custody. It is further ordered that the bail given pursuant to the order of this Court be exonerated.

PEEK and SCHOTTKY, JJ., concur.

PEOPLE v. MILLUM.***Cr. 5034.****District Court of Appeal, Second District,
Division 2, California.****Oct. 29, 1953.****Hearing Granted Nov. 24, 1953.**

Defendant was convicted of unlawful possession of marijuana. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment, and from the judgment and sentence, defendant appealed. The District Court of Appeal, McComb, J., held that the conviction was sustained by substantial evidence.

Purported appeal from sentence dismissed and judgment affirmed.

1. Poisons ☞9

Conviction of unlawful possession of marijuana was sustained by substantial evidence. Health and Safety Code, § 11500.

2. Criminal Law ☞260(11)

Trial court's finding, supported by substantial evidence, that defendant's admission that marijuana found in suitcase and pocket of shirt in his bedroom belonged to him was made freely and voluntarily was binding upon reviewing court on appeal from conviction of unlawful possession of marijuana, though admission was made only after defendant had been told that he and the young lady found in house with him were to be arrested. Health and Safety Code, § 11500.

3. Criminal Law ☞698(1)

Any error in admitting testimony as to admission or confession made by defendant as to ownership of marijuana found in his room was waived by failure of defendant to make any objection in trial court to admission of such testimony or any motion to strike such testimony from the record. Health and Safety Code, § 11500.

4. Criminal Law ☞1036(1), 1044

Error may not be predicated upon admission in evidence of incriminating admissions or confessions, even though admissions were made under circumstances indicating intimidation, where defendant

made no objection in trial court to admission of such testimony and no motion to strike objectionable testimony from the record.

5. Criminal Law ☞1036(1)

Any error in admitting testimony that narcotics agents had stated to defendant that they had information that he was selling marijuana and kept some at home, though defendant thereafter admitted that marijuana found in his room was his, was waived by failure to object at trial to admission of such testimony and such error could not be urged for the first time on appeal. Health and Safety Code, § 11500.

6. Criminal Law ☞1023(10)

An appeal would not lie from sentence and should be dismissed.

Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 11500 of the Health and Safety Code, (possession of flowering tops and leaves of Indian Hemp), after trial before the court without a jury, defendant appeals. There is also a purported appeal from the sentence.

Facts: A government narcotic agent entered an apartment in a building located in the City of Los Angeles. He was admitted by a lady. In the bedroom of the apartment defendant was making a telephone call. In the closet of the bedroom, the agent found a suitcase which contained marijuana or Indian Hemp, and a shirt in the pocket of which there was a cigarette which official analysis disclosed also contained marijuana. After having denied that the property belonged to him, defendant was told he and the young lady in the house were going to be arrested, whereupon defendant stated with reference to the property "that it was all his" and that the lady had no knowledge of the marijuana's being there.

* Subsequent opinion 267 P.2d 1039.

Questions: First: Was there substantial evidence to sustain the judgment?

[1] *Yes.* Witnesses gave direct testimony of each of the facts set forth above which, being believed by the trial court, constitute substantial evidence to sustain the judgment. (See *People v. Hoff*, 84 Cal. App.2d 398, 400, 190 P.2d 616; *People v. Van Valkenburg*, 111 Cal.App.2d 337, 340 [1b], 244 P.2d 750.)

Second: Was defendant's admission with reference to the narcotic which the agent had located in defendant's room free and voluntary?

[2-4] *Yes*, for two reasons: (1) the officer testified that defendant's admission was made freely and voluntarily and since the trial court found, supported by substantial evidence this was true, its finding is binding upon this court (Cf. *People v. Castello*, 194 Cal. 595, 600 [2], 229 P. 855; *People v. Samenigo*, 118 Cal.App. 165, 169 [3] et seq., 4 P.2d 809, 5 P.2d 653); (2) the testimony relative to the admission or confession was received without objection. Therefore defendant has waived any right to urge error upon the receipt thereof in evidence for the reason the law is settled that error may not be predicated upon the admission in evidence of incriminating admissions or confessions of a defendant, even though the admissions were made under circumstances indicating intimidation, where defendant makes no objection in the trial court to the introduction of any or all the testimony in question, and fails to make a motion to strike the alleged objectionable testimony from the record. (*People v. Costa*, 81 Cal.App. 309, 312 [1], 253 P. 940.)

Third: Did the trial court commit prejudicial error in receiving in evidence an accusatory statement made to defendant?

[5] *No.* Testimony was received that one of the officers stated to defendant they had information that he was selling marijuana; that he kept some at home; that they wanted to know something about it; and defendant denied knowing anything about it. Thereafter defendant admitted the marijuana which the officers found in his room was his. Defendant argues, citing *People v. Simmons*, 28 Cal.2d 699, 712

[5], 172 P.2d 18, that since he denied the marijuana was his, there was no admission and nothing to be received in evidence. However, the foregoing rule is subject to this one, to wit, that unless an objection is made at the trial to the reception of allegedly improper evidence, objection is waived and may not be urged for the first time on appeal. (*People v. Simmons*, supra, 28 Cal.2d at page 723, 172 P.2d at page 31; *People v. King*, 114 Cal.App.2d 95, 104 [5] et seq., 249 P.2d 563.)

In the present case defendant did not object to the alleged improper evidence. Therefore he has waived any right to urge such objection in this court.

[6] Since an appeal does not lie from the sentence, the purported appeal therefrom is dismissed. (*People v. Smith*, 22 Cal. App.2d 209, 211 [4], 70 P.2d 677. See cases cited 16 West's California Digest (1951), Criminal Law, ¶1023.10, p. 737.)

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.



120 Cal.App.2d 882

PEOPLE v. ROSS.

Cr. 2398.

District Court of Appeal, Third District,
California.

Oct. 28, 1953.

Defendant was convicted of burglary in the second degree. The Superior Court, Amador County, Ralph McGee, J., entered judgment and denied defendant's motion for a new trial and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that statements made by district attorney in argument to jury referring to defendant's lack of respect for his family, his "ex-con" friends, and his gambling debts did not constitute prejudicial misconduct in view of defendant's voluntary state-

ment that he was a poker player and that this was the cause of trouble between him and his wife.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law ⇨741(1), 742(1), 745

Functions of jury include determination of credibility of witnesses, weighing of evidence, and drawing of justifiable inferences of fact from proven facts.

2. Criminal Law ⇨731

The trial judge must deny jury any opportunity to operate beyond its province and jury may not be permitted to conjecture merely or to conclude on speculation or from passion, prejudice or sympathy.

3. Criminal Law ⇨753(2)

If evidence is such that reasonable jurors must necessarily have a reasonable doubt as to guilt, judge must require acquittal.

4. Criminal Law ⇨741(1)

If a reasonable mind might fairly have a reasonable doubt or might fairly not have one as to guilt of accused, case is for the jury.

5. Criminal Law ⇨731

The judge's function is exhausted when he determines that the evidence does or does not permit conclusion of guilt beyond reasonable doubt within fair operation of reasonable mind.

6. Burglary ⇨45

In prosecution for burglary of a school, issue of guilt or innocence of defendant in whose automobile trunk was found a hammer which was proven to have made marks on school safe and a crowbar with prong missing, which steel claw found at scene of crime fitted, but who claimed he lent tools to defense witness during time burglary was committed was for jury.

7. Criminal Law ⇨1171(6)

In prosecution for burglary of school, statements made by district attorney in argument to jury wherein he referred to defendant's lack of respect for his family, his "ex-con" friends and his gambling debts, did not constitute prejudicial misconduct, in view of defendant's voluntary tes-

timony that he was a poker player and that this was the cause of trouble between him and his wife.

8. Criminal Law ⇨720(8)

In prosecution for burglary of school, expression of opinion by district attorney that he was sure that defendant was at the school on night of burglary was not improper, since it must be assumed that district attorney meant that he was sure of that fact because evidence showed it.

9. Criminal Law ⇨723(1)

In prosecution for burglary of school, query of district attorney as to whether or not jury wanted defendant to come back and do the job over again or as to whether jury would fit the jigsaw puzzle together and put defendant where he belonged was not improper as an appeal to passion.

10. Criminal Law ⇨728(2)

Ordinarily, failure to object or take exception to alleged misconduct of district attorney constitutes a waiver of such objections.

11. Criminal Law ⇨728(2)

Where misconduct of district attorney is of such character that its harmful effect could not be removed by striking objectionable remarks or admonishing jury to disregard them, general rule that failure to object or take the exception to alleged misconduct of district attorney constitutes a waiver does not apply.

12. Criminal Law ⇨911, 1156(1)

Motion for new trial is addressed to sound legal discretion of trial court and its action will not be disturbed on appeal except where there is manifest a clear and unmistakable abuse of discretion.

13. Criminal Law ⇨938(1)

Trial court, on application for new trial on ground of newly discovered evidence, is vested with enlarged discretion, in view of disfavor with which such applications are regarded.

14. Criminal Law ⇨938(1)

Discretion of trial court on motion for new trial on ground of newly discovered evidence is to be exercised in determining diligence shown, truth of matters stated,

materiality and probability of their effect if believed to be true.

15. Criminal Law §938(1)

In prosecution for burglary of school, refusing new trial on ground of newly discovered evidence showing that another school had been burglarized in another town and that *modus operandi* of two school burglaries was the same and that individual who had testified in favor of defendant at trial admitted both burglaries and stated that defendant was not with him was not abuse of discretion.

Melvin L. Pierovich, Jackson, for appellant.

Edmund G. Brown, Atty. Gen., Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

The appellant was convicted of burglary in the second degree and, after denial of his motion for a new trial, was sentenced to imprisonment in San Quentin, where he is now incarcerated. He appeals from the judgment entered upon the jury's verdict and from the order denying a new trial on the grounds that the wholly circumstantial evidence is insufficient to sustain the verdict and that prejudicial error resulted from alleged misconduct of the district attorney and from the trial court's abuse of discretion in denying his motion for a new trial.

The commission of the burglary is undisputed. Between the hours of 4:30 p. m. on Wednesday, April 16, 1952, and 6:30 a. m. on Thursday, April 17, 1952, the Amador County High School was broken into and \$42 stolen from a safe in the main building, to which entrance had been gained by prying open a window with some heavy instrument. The only clues found were hammer marks on the safe and a steel claw, apparently broken off from a hammer or crowbar used to "jimmy" the window. The evidence supports the following recital of facts:

Late on the following Saturday night, April 19, 1952, a deputy sheriff of Sacramento County observed appellant and three

companions drive up behind the rear of buildings in the Town and Country Village on the outskirts of the City of Sacramento. He inquired as to what they were doing and was informed they had turned off the road by mistake. Upon request, appellant willingly opened the trunk of his car in which were found a number of tools which appellant said were his and used in his employment as a roofer. Among these was a hammer, which was proven to have made the marks found on the rifled school safe, and a crowbar with a prong broken off. The steel claw found at the scene of the crime fitted the break perfectly. Appellant and his companions voluntarily submitted to arrest and were confined in the county jail, where, on the following Monday morning, April 21, 1952, appellant, without being advised as to why he was apprehended or of what he was suspected, was interrogated. He again admitted ownership of all the tools found in his car and maintained that he had never loaned them to any one and that his car was never driven by any one other than himself and his wife except on one occasion when it was borrowed for about one-half hour by Everett Gibson who was one of appellant's companions at the time of his arrest. Appellant alone was charged with burglarizing the Amador County High School. At his trial he repudiated his former statements and corroborated the testimony of the aforementioned Gibson that he borrowed appellant's tools on Tuesday, April 15, 1952, and replaced them in his car on Saturday, April 19, 1952, while appellant was in a barbershop just shortly before they left Monterey for Sacramento where they were apprehended that evening. Appellant claimed that he made his prior contradictory statements when he was not charged with any crime and under the belief that it would expedite his early release from custody.

Appellant sought to prove alibi. He introduced evidence that he was a resident of Monterey County and was there employed by his brother for whom another brother also was a roofer. The Amador County High School is approximately 194 miles distant from appellant's place of abode and employment. Data on records kept in the

usual course of business supported the testimony of appellant's two brothers and his foreman, who was not a relative, that appellant worked in Monterey ten hours each day on April 16 and 17, 1952, and nine hours on April 18th. Appellant's wife testified that he returned from work on April 16, 1952 at about 6 p. m. and remained home until the following morning when he left for work at about 6:00 o'clock. One of appellant's brothers testified that between 7:00 and 8:00 o'clock on the night of April 16, 1952 he was with appellant at his house listening to a radio broadcast of a prizefight. Appellant's paycheck for the week of April 14th-18th, which was endorsed in his name and cashed in Monterey on or before April 19th, was introduced in evidence. The brother for whom appellant worked testified that the amount thereof, \$89.90, was for 39 hours straight time at \$2.75 an hour and six hours at time and one-half, less \$17.10 for tax deductions and \$25 for an advance previously made to appellant.

[1-5] Appellant contends that, as a matter of law, in view of the foregoing evidence that he was in Monterey County between 4:30 p. m. on April 16, 1952 and 6:30 a. m. on April 17, 1952, the jury could not find "*beyond a reasonable doubt*" that he was in Amador County between those hours, and, therefore, they were compelled to find that his alibi was established and that the circumstantial evidence was insufficient to warrant his conviction. But, as stated in *People v. Huizenga*, 34 Cal.2d 669, 675-676, 213 P.2d 710, 713,

"* * * This contention confuses the function of court and jury by implying that if the court itself can formulate a reasonable theory of innocence from the evidence it must reverse a judgment of conviction. It is not for the court, however, to determine whether it can formulate such a theory. It must assume in favor of the verdict the existence of every fact that the jury could reasonably deduce from the evidence and then determine whether or not a reasonable jury could find the defendant guilty beyond a rea-

sonable doubt. * * * Thus, 'the rule that the circumstances relied upon by the prosecution must be consistent with guilt and inconsistent with an hypothesis of innocence is a rule of instruction for the jury, and is not the rule for the guidance of the court on review. *People v. Newland*, supra, 15 Cal.2d [678], at page 682, 104 P.2d [778], at page 780.

" 'The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he determines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.' *Curley v. United States*, 81 U.S.App.D.C. 389, 160 F.2d 229, 232."

[6] Respondent maintains that under the foregoing rule the jury could reasonably have found appellant guilty beyond a

reasonable doubt since the crowbar and a hammer found in appellant's possession at the time of his arrest are admitted to be tools used in the burglarizing of the Amador County High School. It is pointed out that the jury were entitled to disbelieve the testimony of the ex-convict Gibson as probably untrustworthy, to give no credence to appellant's testimony due to his contradictory statements, to discredit appellant's other witnesses due to their interest in exonerating him, and to find that the \$25 deducted from appellant's paycheck for the week of April 14th-18th was not for a previous advance as claimed, but for time he was absent from his work, presumably on April 16th and 17th. Respondent further argues that even if the jury believed appellant worked in Monterey on the days involved, they could have found that he made a round trip from Monterey to Amador County between 8 p. m. on April 16th and 6:00 o'clock the following morning as this would have required but eight hours' driving time. These contentions must be sustained. The issue of guilt or innocence here was a factual one which the jury, acting within its proper sphere, has finally decided. See *People v. Parkinson*, 138 Cal. App. 599, 33 P.2d 18, for case strikingly similar on its facts which were held sufficient to support conviction. See, also, *People v. Taylor*, 4 Cal.2d 495, 50 P.2d 796.

The judgment and order denying a motion for a new trial must be affirmed unless, as appellant contends, the district attorney was guilty of prejudicial misconduct or the trial court abused its discretion in denying the motion for a new trial. We hold that neither of said grounds for reversal of the judgment or order exists.

[7] Appellant complains of many statements made by the district attorney in his argument to the jury wherein he referred to appellant's lack of respect for his family, his "ex-con" friends, and his gambling debts. However, as pointed out by the respondent, the appellant voluntarily stated that he was a poker player and this was the cause of trouble between him and his wife. In *People v. Tuthill*, 31 Cal.2d 92, 98, 187

P.2d 16, 19, the prosecuting attorney in his argument to the jury remarked as to the "irresponsibility of this defendant, his plain worthlessness". The court held this did not constitute misconduct, as it "was said in connection with comments upon the business venture of defendant and the deceased. In view of defendant's own testimony as to his drinking habits and other activities, the statement cannot be said to be without justification."

[8] Likewise, the district attorney was entitled to express the opinion that he was sure that the appellant was at the Amador County High School on the night of the burglary as it must be assumed that he meant he was sure of this fact because the evidence showed it. *People v. Acuff*, 94 Cal.App.2d 551, 558, 211 P.2d 17.

[9] There was no appeal to passion in the district attorney's query as to whether or not the jury wanted appellant to come back and do the job over again or if they would fit the jigsaw puzzle together and put him where he belonged. On appeal from a judgment entered on a conviction of possession of narcotics in *People v. Head*, 108 Cal.App.2d 734, 737, 738, 239 P.2d 506, it was contended that the remarks of the district attorney were inflammatory and highly prejudicial. He had argued that it was necessary for the jury to put up a stop light for all teenagers and if the jury did not return a proper verdict, they were giving a green light. The court held this could only be construed as meaning that the prosecution was convinced from the evidence that the defendants were guilty and that if they were, an acquittal would encourage them and others to continue trafficking in narcotics.

Likewise, in *People v. Parkinson*, supra, 138 Cal.App. at page 606, 33 P.2d at page 21, where a key found on defendant's person fitted the lock on the door of the burglarized premises, it was held there was no misconduct in the district attorney's arguing:

"* * * And how would the key get into Parkinson's possession? And

that is the thing, the key to the whole situation in this case: The key was just a little too much. That is one of the things that you can't explain, and they could argue until Doomsday, and how could they explain it? And I want you to pay particular attention to that, because it is not only the door key, but it is the key to this whole case, the thing that ties up the defendant Parkinson in the case so completely that there is absolutely and positively no doubt; * * * that door was closed there and Parkinson had the key that turned the lock on the door, that not only locked it but unlocked it, * * *. [I]f Parkinson didn't use the key to open the door that led in there, how did the key get back into Parkinson's pocket?" "

[10, 11] Appellant admits that in most instances he failed to object or take exception to the alleged misconduct of which he now complains and that ordinarily such failure would constitute a waiver of such objections. *People v. Simon*, 107 Cal.App. 2d 105, 236 P.2d 855. However, he contends that the misconduct was of such character that its harmful effect could not be removed by striking the objectionable remarks or admonishing the jury to disregard them and, therefore, the exception to the general rule as enumerated in *People v. Ford*, 89 Cal.App.2d 467, 470-471, 200 P.2d 867; *People v. Kirkes*, 39 Cal.2d 719, 726, 249 P.2d 1; *People v. Braun*, 14 Cal.2d 1, 7-8, 92 P.2d 402; *People v. Podwys*, 6 Cal. App.2d 71, 44 P.2d 377, is applicable.

[12-15] We do not find that the district attorney pursued a continuous and flagrant course of misconduct which was so prejudicial that it resulted in a miscarriage of justice. In fact, in most instances objections would have been overruled as the district attorney's statements were within the realm of legitimate argument based on the evidence in the case.

Neither the judgment nor the order denying the motion for a new trial can be reversed on the ground of insufficiency of the evidence or prejudicial misconduct of the

prosecution, but the appellant urges that there was a clear abuse of discretion by the trial court in denying his motion for a new trial because of newly discovered evidence. In support of said motion appellant presented an affidavit of the Chief of Police of Placerville wherein it was set forth that on the night of April 16th or the morning of April 17th the Placerville Grammar School was burglarized and that the *modus operandi* was the same as that of the burglarization of the Amador County High School. There was also presented the affidavit of Everett Gibson wherein he admitted both burglaries and stated appellant was not with him. It is appellant's contention that this establishes his innocence as it would have been physically impossible for him to have traveled 444 miles and participated in both burglaries between 5:30 p. m. on April 16th and 6:30 a. m. on April 17th. What we have said above as to the sufficiency of the evidence produced at the trial applies with equal force to the new matter presented on the motion for the new trial. The trial judge was fully justified in concluding that no credence should be accorded the affidavit of Gibson whose demeanor he had the opportunity to observe at the trial. The rule is well established that:

"* * * 'A motion for new trial is addressed to the sound legal discretion of the trial court, and its action will not be disturbed upon appeal except in an instance manifesting a clear and unmistakable abuse of such discretion. This rule is peculiarly applicable to an application based upon the ground of newly discovered evidence, as to which an enlarged discretion is committed to the trial court, because of the disfavor with which such applications have always been regarded. This discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them if believed to be true. The question as to whether the evidence produced on the motion is such as to render a different result probable is one peculiarly addressed to the discretion of the trial

judge.'” *People v. Parkinson*, supra, 138 Cal.App. at page 612, 33 P.2d at page 24.

The judgment and the order denying the motion for a new trial are affirmed.

PEEK and SCHOTTKY, JJ., concur.



120 Cal.App.2d 802

BACCUS v. KROGER et al.

No. 15569.

District Court of Appeal, First District,
Division 1, California.

Oct. 26, 1953.

Action by pedestrian against city and property owner for injuries sustained when pedestrian fell into depression in sidewalk, allegedly created by property owner when he constructed driveway across sidewalk. The Superior Court, City and County of San Francisco, George W. Schonfeld, J., entered judgment against defendants and property owner appealed. The District Court of Appeal, Bray, J., held that although it was error to permit expert testimony as to unsafe condition of sidewalk, in view of fact that dangerous condition was made very apparent to jury and condition of sidewalk was described to jury and photographs of it were in evidence, the error was not prejudicial.

Judgment affirmed.

1. Evidence ⇨506

In action by pedestrian against city and property owner for injuries sustained when she fell into depression in sidewalk, whether or not the sidewalk was in safe condition for pedestrian use was question for the jury and was not matter for expert testimony.

2. Appeal and Error ⇨1050(1)

Evidence ⇨519

In action by pedestrian for injuries sustained when she fell into depression, in

sidewalk, admission of expert testimony as to unsafe condition of sidewalk was improper, but error was not prejudicial where dangerous condition was made apparent to jury by description and photographs, and the only reasonable conclusion that could be drawn therefrom was that the depression did constitute dangerous condition.

3. Trial ⇨229

In action by pedestrian for injuries sustained when she fell into sidewalk depression, although trial court used the words “dangerous or defective condition” in eleven instructions, the repetition of the phrase was not improper where court impressed upon jury that they were to determine facts in case.

Keith, Creede & Sedgwick, Scott Conley, San Francisco, for appellant.

Healy & Walcom, Leo J. Walcom, San Francisco, for respondent.

BRAY, Justice.

Plaintiff obtained a jury verdict judgment against defendant Kroger and the City and County of San Francisco in the sum of \$4000 for personal injuries suffered. Kroger alone appeals.

Questions Presented.

1. Was it prejudicial error to permit expert testimony as to the unsafe condition of the sidewalk?

2. Was the use in eleven instructions of the words “dangerous or defective condition” error?

Evidence.

No attack is made on the sufficiency of the evidence. Defendant owns the premises at 19 Hoff Street, San Francisco. In 1907 he constructed a private garage and a driveway entrance thereto. This driveway crossed the sidewalk to the building which was contiguous with the inner edge of the sidewalk. Near the building there was a gradual decline extending from the sidewalk level to a depth some 6 inches below that level. The sides of the depression thus created were vertical. Plaintiff and her husband were returning early in the morn-

ing from a ball. She stepped into the depressed driveway with her left foot. In attempting to step out the high heel of the shoe on her right foot caught on the edge of the decline. She fell, fracturing two bones of her right ankle.

1. Expert Testimony.

Plaintiff called a structural engineer, who qualified as an expert. He was asked, over objection, if the depressed driveway in the sidewalk was "good safe standard engineering practice in the design of garages." He replied, "In my opinion, it is not standard and safe construction." When asked "why it is not safe construction," he replied, "We have an abrupt drop in the sidewalk at a point where it would not ordinarily be anticipated or expected." "If they were of very gradual slope, extended back some distance from the edge of the driveway so a person approaching that depression would walk down a gradual slope instead of coming to an abrupt drop, it would be much safer." In overruling the objection to one of these questions the court stated: "He is testifying as an expert, and, of course, you, the ladies and gentlemen of the jury, are to decide the facts of the case for yourselves." Later the court gave the usual instruction concerning the function of expert testimony.

[1] Obviously, whether the sidewalk was in a safe condition for pedestrian use was a question for the jury and not for an engineer.

Wilkerson v. City of El Monte, 17 Cal. App.2d 615, 62 P.2d 790, involved depressions across a city's streets, commonly called "dips." Two expert witnesses were permitted to testify that in their opinions these dips were unsafe for vehicle travel. The court held that there was no need for opinion evidence on the subject; that the opinions given were upon the ultimate question of fact to be determined by the jury and were clearly invasions of the province of the jury. "If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence and the conclusions or inferences

must be drawn by the jury." 17 Cal.App.2d page 622, 62 P.2d page 794.

"Usually an expert cannot be asked whether a structure is a safe one, but all the facts may be elicited from the witness from which the conclusion follows." *McStay v. Citizens Nat. T. & S. Bank*, 5 Cal.App.2d 595, 601, 43 P.2d 560, 562.

[2] While the admission of the above quoted testimony was error, we do not see how it can be held to be prejudicial in this case. Not only was the condition of the sidewalk described to the jury but photographs of it were in evidence. The dangerous condition sticks out like a sore thumb. The only reasonable conclusion that can be drawn therefrom is that the depression did constitute a dangerous condition. Nor is it reasonable to assume that the jury verdict would have been any different that it was, had the expert not testified.

2. Instructions.

[3] Defendant complains of the use of the words "dangerous or defective condition" in eleven different instructions. It must be remembered that this action was brought against the City and County of San Francisco as well as against defendant Kroger. As against the city it is based upon the Public Liability Act, which makes a municipality liable for injuries resulting from the dangerous or defective condition of public streets, etc. The court properly gave the jury the terms of the act and necessarily had to use the criticized phrase. Defendant does not claim that the instructions given were erroneous, but claims, in effect, that the repetition of the phrase by the court would cause the jury to believe that the court had taken away from them the determination of the question of whether there was a dangerous or defective condition. Reading the instructions as a whole we find no such effect. The court clearly impressed upon the jury that they were to determine the facts in the case including whether a dangerous or defective condition existed. Three of the instructions were proposed by the city. In each instruction where the phrase was used it was necessarily used in defining the con-

ditions under which the city could and could not be held liable. They were necessary to inform the jury fully of plaintiff's theory of the liability of the city, and the theory of the city's defense thereto. We fail to see how the court could have avoided using the phrase in order to charge the jury fairly.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.



120 Cal.App.2d 844

HALL et al. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY.

District Court of Appeal. Third District.
California.

Oct. 27, 1953.

As Modified Nov. 9, 1953.

Hearing Denied Dec. 23, 1953.

Proceeding to prohibit Superior Court, Sacramento County, from taking further proceedings upon information charging defendants with murder. The District Court of Appeal, Schottky, J., held that even though motion to withdraw pleas of not guilty for purpose of making motion to set aside information came after trial in which jury disagreed, granting of motion to withdraw pleas was not abuse of discretion.

Judgment in accordance with opinion.

1. Criminal Law Ⓒ240

Before a defendant may be held to answer to Superior Court, it must appear from testimony at preliminary examination that a public offense has been committed.

2. Criminal Law Ⓒ406(1)

The corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish fact to which they relate.

3. Criminal Law Ⓒ517(4), 538(3)

Upon a charge of homicide, producing the dead body does not establish the corpus

delicti and proof of the dead body joined with a confession by defendant of his guilt would not be sufficient to convict, for there must be some evidence tending to show commission of a homicide before defendant's confession would be admissible for any purpose.

4. Criminal Law Ⓒ563

The corpus delicti may be proved by circumstantial evidence and inferences that may reasonably be drawn therefrom and if a prima facie case is presented that deceased met his death by means of an unlawful act of another, the evidence is sufficient.

5. Homicide Ⓒ228(1)

To prove a prima facie case of corpus delicti, all that is required is to show a reasonable probability that a criminal act of another has been the direct cause of death of deceased.

6. Homicide Ⓒ228(2)

Evidence, including opinion of autopsy surgeon that rupturing of decedent's liver was caused by blow, which was adduced at preliminary examination was insufficient to establish with a reasonable degree of probability that criminal act was cause of death of decedent who came to his home in a very drunken condition, made no complaint and had no bruises upon him, who asked for food and went to his room where he was found dead the next morning.

7. Criminal Law Ⓒ234

Prohibition Ⓒ5(4)

Where at the preliminary examination there was a failure of proof that a homicide had been committed, extrajudicial statements of defendants were not admissible and could not be considered for any purpose and prohibition was appropriate means to test right of the people to proceed with murder prosecution.

8. Criminal Law Ⓒ301

Trial court has power to allow plea to be withdrawn for purpose of hearing and determining motion to set aside information, but exercise of that power necessarily is left to discretion of trial judge. Penal Code, §§ 995-997, 999a.

9. Criminal Law — 301

Even though motion to withdraw pleas of not guilty for purpose of making motion to set aside information was made after a trial in which jury disagreed, granting of motion to withdraw pleas was not abuse of discretion.

Peter Mannino, Edwin L. Z'Berg, Sacramento, Keith W. Lamb, Asst. Public Def., for petitioners.

Edmund G. Brown, Atty. Gen. by Doris H. Maier, Sacramento, Elvin F. Sheehy, Dist. Atty., Sacramento, for respondent.

SCHOTTKY, Justice.

Petitioners filed in this court a petition to prohibit the Superior Court of the State of California, in and for the County of Sacramento, from taking any further proceedings upon an information theretofore filed against petitioners. The said information charged petitioners with the crime of murder, and following a preliminary examination they were held to answer. They then entered pleas of not guilty and were tried in the Superior Court, which trial resulted in the jury disagreeing. Thereafter, petitioners moved the trial court for leave to withdraw their pleas in order to move the court to set aside the information upon the ground that they had been illegally committed. Their motion to withdraw their pleas was granted and they then made a motion to set aside the information, which motion was denied by the court. Their pleas of not guilty were then reinstated, and the cause was set for trial for Wednesday, September 23, 1953. Within the statutory time petitioners filed herein their petition for a writ of prohibition and we issued an alternative writ and stayed further proceedings in the Superior Court pending the decision of this court upon said petition.

The principal contention of petitioners is that the proof at the preliminary examination failed to establish the corpus delicti of the offense charged, and that the defendants were held to answer without reasonable or probable cause, and therefore the information was illegal and void. Petitioners argue that the oral statements of

the petitioners which were admitted against them at the preliminary examination, over the objections of petitioners, could have no weight because the corpus delicti had not been shown.

[1,2] It is, of course, elementary that before a defendant may be held to answer to the Superior Court it must appear from the testimony at the preliminary examination that a public offense has been committed, and as this court said in *In re Schuber*, 68 Cal.App.2d 424, at page 425, 156 P.2d 944, at page 945:

"As stated in the case of *People v. Simonson*, 107 Cal. 345, 40 P. 440: 'It is elementary that the corpus delicti must be established before extrajudicial statements and admissions of a defendant are admissible in evidence and can be considered as tending to establish the fact to which they relate.' That such is the overwhelming weight of authority in this country must be conceded. In *re Kelly*, 28 Nev. 491, 83 P. 223.

"While it is true that preliminary examinations of persons accused of crime when held before a committing magistrate are usually less formal in matters of procedure than would be required upon the trial of the cause the essential principles of procedure and of evidence may not be departed from by committing magistrates in the conduct of such examinations, In *re Williams*, 52 Cal.App. 566, 199 P. 347, and although the committing magistrate may hold a defendant to answer upon evidence which would not support a verdict of guilty, nevertheless there must be some evidence tending to show the commission of the crime charged before a defendant's admission or confession can be introduced for any purpose. *People v. Kaye*, 43 Cal. App.2d 802, 111 P.2d 679."

At the preliminary examination one Casimiro Brea, who occupied a cabin down on the river front in Sacramento, at which cabin decedent Rosario Gonzales also resided, testified that decedent came home at 7:30 p. m. on the night of March 31, 1953; that he was in a very drunken condition, having been drinking for two or three weeks, but that the witness saw no

bruises upon him; that decedent went into his room and Brea did not see him again until about 6:00 o'clock the next morning when, after preparing coffee, he called decedent, and getting no answer went into decedent's room and found him dead in bed. Dr. G. A. Prinszano performed an autopsy at 4:00 p. m. on the afternoon of April 1, 1953, and testified that the autopsy showed a ruptured liver with extensive internal bleeding, and that death was caused by the ruptured liver and the accompanying shock and internal bleeding. Analysis of the blood of decedent showed an alcoholic content of .310, and the doctor testified that this meant that the man was drunk when he died. The doctor testified further:

"Q. [Mr. Sheehy]: And did you arrive at any conclusion as to the manner in which the injury had been received to that individual's liver? A. No, just speculation, There was no evidence of any bruises.

* * * * *

"A. Well, in my opinion since the body had no evidence of bruises or any other evidence of any—we had no history of any trauma of any sort, in my opinion such an injury could be caused by a blow whether it was a fist or a kick.

"Mr. Sheehy: Q. But it was your opinion that it was received as a result of some blow of some sort, is that true? A. Yes."

The doctor testified further that in a man in the drunken condition that decedent was in, the abdominal muscles would be relaxed and that a blow delivered there could rupture the liver and cause the damage he found. He said there were no external bruises anywhere on the body which he would have expected to find had the ruptured liver been caused by falling or being struck by an automobile, and the like. He said, however, that if falling or running into an object could simulate the force of a blow to the abdomen it could have the same effect, but that he deemed this rather far-fetched.

Officer Francis Gregory testified that on April 2nd he began interviewing five boys whom the officers suspected of having beaten decedent. Counsel for petitioners

objected at the preliminary examination to the court's receiving the extrajudicial statements upon the ground that the *corpus delicti* had not been proved, but said objection was overruled, and the officer testified that the story of the boys was that for about three weeks they had amused themselves by going down into the skid row section of Sacramento and beating up drunks whom they found in the streets and alleys; that they identified a picture of decedent as one of those they had beaten up and stated that one of them had kicked him and then lifted him up in a sitting position while the third struck him in the abdomen. How long this occurred before decedent got back from skid row to the cabin on the river was not shown.

[3] In *People v. Simonsen*, 107 Cal. 345, at page 346, 40 P. 440, the court said:

"The term '*corpus delicti*' means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the dead body does not establish the *corpus delicti*. It would simply establish the *corpus*; and proof of the dead body alone, joined with a confession by the defendant of his guilt, would not be sufficient to convict, for there must be some evidence tending to show the commission of a homicide, before a defendant's confession would be admissible for any purpose. Upon a charge of arson, mere proof that a building was destroyed by fire does not establish the *corpus delicti*; and the defendant's confession of his guilt, made extrajudicially in connection with such proof, is not sufficient to sustain a judgment of conviction, for there is no evidence of the commission of a crime other than the defendant's statements, and the law, in the exercise of a jealous care over its subjects, demands something more. To be sure, the appearance of the dead body, the nature of the wounds, the evidences of a struggle, the physical circumstances surrounding the affair, may furnish evidence of the *corpus delicti*; they may indicate that a crime has been committed; but there must be proof of the fact from some source other than the defendant's admissions."

[4,5] The corpus delicti may be proved by circumstantial evidence, and the inferences that may reasonably be drawn therefrom. If a prima facie case is presented that the deceased met his death by means of an unlawful act of another, the evidence is sufficient. To prove a prima facie case of corpus delicti all that is required is to show a reasonable probability that a criminal act of another has been the direct cause of the death of the deceased. *People v. Ives*, 17 Cal.2d 459, 463, 110 P.2d 408.

[6] Applying these well settled principles to the instant proceeding we are convinced that evidence adduced at the preliminary examination falls far short of indicating with a reasonable degree of probability that the criminal act of someone was the cause of death. The opinion of the autopsy surgeon that the rupturing of the decedent's liver was caused by a blow was not of sufficient substantiality to warrant the conclusion that any such blow was inflicted unlawfully. At most the autopsy surgeon's testimony was to the effect that some external force had caused the rupture of the liver, but the mere rupturing of decedent's liver fails to prove that this was due to any unlawful or criminal act. The record of the preliminary examination shows that decedent came to the cabin at 7:30 p. m. in a very drunken condition; that he made no complaint and had no bruises upon him; that he asked for food and then went to his room where he was found dead at 6:00 o'clock the next morning. Disregarding, as we must, the extrajudicial statements of petitioners, there is no evidence, direct or circumstantial, from which it can reasonably be inferred that the death of decedent was caused by criminal means, and hence there is lacking one of the requisites of a prima facie case of homicide.

[7] We are driven to the conclusion that the people failed to prove at the preliminary examination that a homicide had been committed and that the extrajudicial statements of petitioners were not admissible and could not be considered for any

purpose. Therefore petitioners were held to answer without reasonable or probable cause and prohibition is an appropriate means to test the right of the people to proceed with the prosecution. *Greenberg v. Superior Court*, 19 Cal.2d 319, 121 P.2d 713; *Whitlock v. Superior Court*, 97 Cal. App.2d 26, 217 P.2d 158; *Jackson v. Superior Court*, 98 Cal.App.2d 183, 219 P.2d 879.

[8,9] The Attorney General contends that the petitioners, by failing to raise the question of lack of reasonable and probable cause at the time of the first trial by way of motion to dismiss the information, are precluded from now raising this question.

Section 995 of the Penal Code states that the information must be set aside by the court in which the defendant is arraigned, upon his motion, if before the filing thereof the defendant had not been legally committed by the magistrate or had been committed without reasonable or probable cause. Section 996 states "If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned" in section 995. Section 997 provides that if the motion is denied the defendant must immediately answer the information by demurring or pleading. Section 999a declares that an application for petition for a writ of prohibition predicated upon the ground of lack of probable cause for commitment must be filed within 15 days after denial of motion to set aside the information. In *People v. Linton*, 102 Cal. App. 608, 611, 283 P. 389, 391, the court declared that a trial court "has power to allow the plea to be withdrawn for the purpose of hearing and determining such a motion, but the exercise of that power necessarily is left to the discretion of the trial judge", citing *People v. Ronsse*, 26 Cal.App. 100, 146 P. 65. In *People v. Kellogg*, 6 Cal. 2d 448, 454, 57 P.2d 1305, 1308, the court had this to say:

"* * * Furthermore, the motion to set aside the information was made after the defendant entered his pleas. No re-

quest was made for permission to withdraw the pleas for the purpose of making the motion, and there is no showing of any abuse of discretion on the part of the trial court in denying the motion." Citing *People v. Magee*, 60 Cal.App. 459, 462, 213 P. 513, and *People v. Linton*, 102 Cal. App. 608, 611, 283 P. 389.

While it is true that the motion to withdraw the pleas for the purpose of making a motion to set aside the information came quite late, it was made after a trial in which the jury disagreed. This disagreement in effect placed the parties in the same position they were in before the trial. The trial judge who heard the evidence at the trial granted the motion to withdraw the pleas and we cannot say that he abused his discretion in so doing. The petition for prohibition was filed within 15 days after the denial of the motion to set aside the information and was therefore within the time specified in said section 999a of the Penal Code.

Let the peremptory writ issue as prayed for.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SHENK, EDMONDS and SPENCE, JJ., dissenting.



120 Cal.App.2d 873

PEOPLE v. GRIFFITH.

Cr. 5026.

District Court of Appeal, Second District,
Division 3, California.

Oct. 28, 1953.

Hearing Denied Nov. 24, 1953.

Criminal prosecution for offense of issuing checks without sufficient funds. The Superior Court, Los Angeles County, David Coleman, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence on question whether defendant when issuing checks involved did so

with intent to defraud payees was insufficient to sustain conviction.

Judgment reversed.

1. False Pretenses §5

Intent to defraud person to whom check is delivered is essential element of offense of issuing checks without sufficient funds, and no presumption of law will suffice for proof of intent to defraud. Pen.Code, § 476a.

2. False Pretenses §5

One who negotiates check with knowledge that he has not sufficient funds in bank to meet check, but who has good reason to believe, and honestly does believe, that check will be paid, does not have intent to defraud payee of check. Pen.Code § 476a.

3. False Pretenses §22

Reasonable expectation of payment constitutes defense to charge of passing check without sufficient funds. Pen.Code, § 476a.

4. False Pretenses §49(2)

Evidence on question whether defendant when issuing checks involved did so with intent to defraud payee was insufficient to sustain conviction for offense of issuing checks without sufficient fund. Pen.Code, § 476a.

5. Fraud §1

"Defraud" means to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully.

See publication Words and Phrases, for other judicial constructions and definitions of "Defraud".

Charles C. Montgomery, Jr., Burbank, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was charged in each of two counts with the offense of issuing checks without sufficient funds. Pen.Code, §

476a. Count I alleged that on October 10, 1952, defendant drew and delivered to Walter Munstenteiger a check for \$25 drawn on the Bank of America with intent to cheat and defraud Munstenteiger, Von's Market, and Lynwood, California, Branch of the bank, knowing at the time he had not sufficient funds in or credit with the bank to meet the check in full on presentation for payment. Count II contained similar allegations, the date being October 16, 1952, and the amount \$27. The parties were the same except that defendant was alleged to be the person to whom the check was drawn and delivered. The court, sitting without a jury, found defendant guilty as charged in each count. He appeals from the judgment.

Defendant's principal contention is that there was no evidence of an intent to defraud.

The parties stipulated that the checks were made and issued by defendant for value to Von's Market on the dates charged, and that at the time of the issuance and delivery of each of them he did not have sufficient funds in or credit with the bank to meet payment in full on presentation. Prior to October 1, 1952, defendant had lived in Compton, California, and had had an account with the Compton Branch of the Bank of America. He moved from Compton to South Gate, and on September 30, 1952, he opened an account with the Lynwood Branch of the Bank of America. About October 1st defendant presented a check signed by him and drawn on the Compton Branch to Munstenteiger, assistant manager of Von's Market in Lynwood, which was cashed by Von's Market and dishonored. During the following week defendant went into Von's Market and told Munstenteiger the check would not be good because he had written it on the wrong branch. Munstenteiger then changed the word Compton on the check to Lynwood and took it to the Lynwood Branch where it was honored. When defendant told Munstenteiger the check was written on the wrong branch he neglected to enter the amount of the check, \$25, in his check book. With this exception, all

checks presented by defendant to Munstenteiger prior to October 10th had been honored. The record does not disclose the number. On October 10th there was a balance of \$6.39 in the account. On that day, defendant presented the check of that date to Munstenteiger, who authorized its payment. Defendant cashed it at the checking counter in the market. On October 11th defendant deposited \$70.98 in the Lynwood account. On October 16th defendant presented the check of that date to Munstenteiger who authorized its payment; defendant cashed it at the checking counter in the market. On that day there was 27 cents in the account. On October 22nd or 23rd defendant went to Munstenteiger and told him he (defendant) expected a couple of his checks back, that he would have the money in the bank to cover them, and that they would be taken care of that week end when he got his pay check. Munstenteiger told him: "Don't worry about it. They will be taken care of."

Munstenteiger testified that prior to October 23rd "we had checks that went through, and some that didn't"; that as to the checks which did not go through, he did not discuss the matter with defendant, but simply sent them through again and they were honored, with the exception of those of October 10th and 16th; that about October 23rd defendant told him those of the 10th and 16th were going to be dishonored and they were dishonored on the following day. Defendant testified that at that time he had a \$100 bonus check coming from the place where he had previously worked and was to receive a pay check of \$70 that week end; he collected the \$70 on the 24th. He had been fined by the municipal court on a charge which is not disclosed. On the 24th he appeared in the municipal court and asked for an extension of time within which to pay the fine. The court excused him from the fine and ordered that he spend the week end in jail, to be released the following Monday morning in order to get to work. Munstenteiger learned that defendant was in jail, became alarmed and had the complaint in the present case issued.

On October 3rd defendant gave his landlady a check for \$30 and on October 10th another check for \$30. Several days later his landlady told him one of the checks had been returned by the bank and that she had been advised the other check was going to be returned. Defendant gave her \$60 in cash and she gave him the \$30 check which had been returned and a receipt for the other one.

On October 28th a policeman had a conversation with defendant in which the officer showed him the checks of October 10th and 16th which had been cashed at Von's Market. Defendant stated he had cashed them, that at the time he did not keep an account of the checks he was cashing, therefore he did not know the amount he had in the bank at the time he wrote the checks; that he thought some of them might come back N.S.F., but he had tried to plan on taking care of them in the future.

Defendant testified that about October 22nd or 23rd he discovered his bank account was overdrawn and:

"Q. By Mr. Montgomery: Now, when you found that your account was overdrawn, what did you do about it? * * *
A. I called the bank the following day.

"Q. All right. Now, what did you do about it, as far as the Von's Market is concerned? A. Nothing at that time.

Q. When did you talk to the Von's Market about it? A. Oh, not for about three or four days later."

He testified he did not on either October 10th or 16th know that his account was overdrawn and that he did not intend to defraud. He further testified:

"Q. And you passed a check, sometime before the 10th of October, at Von's Market, in the amount of \$25.00, and that check was on the Bank of—the Compton Bank, and you ultimately made arrangements to have the name 'Compton' changed to 'Lynwood'; is that right? A. Yes, sir; the same bank, but a different branch.

"Q. And that threw your accounting off \$25.00; is that right? A. Yes, sir.

"Q. Other than this \$25.00 check that was drawn on Compton and later corrected to Lynwood, did you have any other accounting problems in your account? A. Yes sir, I did.

"Q. Tell me this: This receipt—this rent receipt—is that what it is? A. Yes—no, sir; it is not a rent receipt. It is a receipt for a check that she said was going to be returned.

"Q. It is a receipt for two \$30.00 checks which you made good to your landlady? A. Just one, because the other check she gave me, but this one she didn't have yet to give me.

"Q. One of them was made good by the exchange of the check, and the other one was made good by sort of anticipation; is that it? A. Yes, sir.

"Q. Now, do you have any explanation as to why these two \$30.00 checks bounced, or were about to bounce, when this \$25.00 check was the only amount your account was off? A. Well, yes, I do, in that I couldn't understand, at the time, and I called the bank the following day, and they said I had \$57.00 in the bank. * * *

"The Witness: I don't honestly understand it myself, why I was overdrawn, except that I called the bank and they said I had \$57.00. That was after this happened. And I gave her sixty. The following day I called the bank and I had fifty-seven, but I had made a deposit between the time this check was written and the time that I called the bank. All my deposits were made by mail, and the only thing that occurred to me was that one of my mail deposits had not gotten to the bank before the check did.

"Q. By Mr. Finnerty: I note the receipt is dated the 17th. When were the two \$30.00 checks given? A. October 10th.

"Q. And on October 10th, you gave a \$25.00 check to Von's and two \$30.00 checks to your landlady; is that right? A. Yes, sir—no, sir. I don't think I gave a \$25.00 check to Von's. It was returned October 10th, drawn on the Compton Branch. Is that the one?

"Q. You gave this \$25.00 check to Von's on October 10th, did you not, drawn on the Lynwood Bank? A. Oh, this is the one, yes, sir. That's right.

"Q. Then you wrote at least three checks on the 10th, two to your landlady and one to Von's? A. Two to my landlady and one to Von's, yes.

"Q. And, as near as you know, you had funds in the bank to clear all of them, except that you were \$25.00 off because a Compton check, unknown to you, had cleared through Lynwood; is that it? A. Yes, sir.

"Q. Well, do you have any explanation as to why the \$27.00 check bounced on the 16th, then? A. Yes, sir. That is what I was starting to say. I called the bank and they said I had \$57.00 in the bank, so I figured since I had already paid out \$60.00 out of my own pocket, that wasn't being charged to my account, and that I was entitled to add that \$60.00 to my account, figuring that I must have a balance of \$117.00.

"Q. I am going to ask you one more question: How much money did you have to pay out of your pocket to pick up all of the overdrawn checks you wrote during the month of October? A. Well, I gave my landlady \$60.00.

"Q. All right. A. I believe that was all.

"Q. You had to put out \$27.00 to pick the one written on the 16th, didn't you? A. No, sir. That wasn't until November.

"Q. The question was, How much money did you have to put out of your own pocket to pick up all of the checks you wrote during the month of October that were overdrawn? A. I am sorry.

"Q. Two to your landlady; that is sixty. One here that is twenty-seven. Is that right? A. Yes.

"Q. One here that is twenty-five; is that right? A. Yes.

"Q. Now, there were other checks, too, were there not? A. Yes.

"Q. What are the amounts of the other check? * * *

"Q. By Mr. Finnerty: The amounts of the other checks? A. There was another one for \$25.00, that I recall.

"Q. All right. Any others? A. There were two for \$5.00.

"Q. Any others? A. I believe that was all.

"Q. All right. Now, that is \$147.00 worth of checks that you had to pick up, or put out money to pick up, that you wrote during the month of October, and the only explanation you have for these checks not clearing through your account is that a \$25.00 check, written on Compton, had to be changed to Lynwood, and that wasn't entered in your record; is that true? A. No, sir. That is one of the reasons.

"Q. All right. Please favor us with the others, if there are any. A. Well, as I said, when I paid out \$60.00 to my landlady, I credited my account with \$60.00, and then I found later that, instead of adding that \$60.00, I should have—

"The Court: Wait a minute. You paid \$60.00 to your landlady?

"The Witness: Yes, your Honor.

"The Court: Why did you credit your account?

"The Witness: Well, because I had deducted that \$60.00 from my account when I wrote the check.

"The Court: You said when you got the checks back—

"The Witness: I figured I had got \$60.00 more than I thought I had.

"The Court: Well, the checks weren't any good, so how could they represent money?

"The Witness: Well, I don't know about that, your Honor.

"The Court: As I understand you, you wrote \$60.00 worth of checks, and they weren't any good, and you got the checks back. Therefore, you had \$60.00 additional money, or more money; is that right?

"The Witness: Well, they were good when I called the bank. * * *

"Q. What do you mean, they were good when you called the bank? A. When I called the bank, they said I had \$57.00 in

the bank. Well, I was \$3.00 short of having enough to cover them.

"Q. Now, at the time you added the \$60.00 instead of subtracting it from your account, that made a difference in the amount that you thought you had in the bank, didn't it? A. How was that again? (Question read by the reporter.) A. Oh, yes, of course.

"Q. When did you pick up the checks, the \$70.00 worth of checks, that you didn't write to Von's Market? In the month of October or the month of November? A. The month of November, after I was released.

"Q. No. I am including the landlady's check. When did you pick up the landlady's check? A. Oh, well, that was about the 17th of October.

"Q. Now, did you write the two checks to the landlady on the 10th of October? A. No. One of them was a week before that. That was the one she had back. The one dated October 10th was the one she didn't have back, the one she gave me the receipt for. * * *

"The Court: Well, what was the great hope that animated you when you wrote \$147.00 worth of checks in the month of October? What were your great expectations that caused you to believe that maybe money would materialize from some place to meet those checks?

"The Witness: I didn't think it was necessary that any money materialize to meet them, your Honor.

"The Court: You thought you had that money?

"The Witness: Yes, sir.

"The Court: But your difficulty that you have stated to the court is that you made a mistake of \$25.00?

"The Witness: And in another one of \$120.00, your Honor.

"The Court: What is the \$120.00?

"The Witness: Adding \$60.00 to my account instead of subtracting, or instead of not adding it, or—I'm not sure which, but I shouldn't have added it, anyway. * * *

"The Court: In other words, if you write two bad checks for \$60.00 and the checks

come back, and you haven't got money in the bank to cover the checks, then you are \$60.00 ahead; you have made \$60.00?

"The Witness: No, sir. It was not to my knowledge, your Honor, that there wasn't enough money in the bank to cover the checks.

"The Court: But you knew the two \$30.00 checks came back?

"The Witness: Yes, sir.

"The Court: So, when you knew that, you knew there wasn't enough money in the bank to cover it.

"The Witness: But I had still deducted that from my figures and my deposits, so, when I paid it out of my pocket, wouldn't I be entitled to add that back again?

"The Court: Well, I don't know how the bank would know that, unless you sent them a radio or telegram. Did you tell the bank about it?

"The Witness: No, sir, the bank wouldn't know about that, I realize that."

[1] An intent to defraud the person to whom the check was delivered is an essential element of the offense charged. In re Scott, 85 Cal.App. 170, 172, 259 P. 101. It is the gist of the offense. People v. Gaines, 106 Cal.App.2d 176, 180, 234 P.2d 702. No presumption of law will suffice for proof of the intent to defraud. People v. Landman, 103 Cal. 577, 580, 37 P. 518; People v. Becker, 137 Cal.App. 349, 352, 30 P.2d 562.

[2, 3] In negotiating a check, the maker does not necessarily represent that he then has in the bank funds out of which it will be paid; but he only represents, by the act of passing the check, that it is a good and valid order for its amount and that the existing state of facts is such that in the ordinary course of business it will be paid on presentation. One who negotiates a check with knowledge he has not sufficient funds in the bank to meet it,—but who has good reason to believe, and honestly does believe, that it will be paid,—cannot be said to have an intent to defraud the payee of the check. See cases collected 35 A.L.R. 384; 95 A.L.R. 499. Reasonable expectation of payment constitutes a defense to the

charge. *People v. Becker*, 137 Cal.App. 349, 354, 30 P.2d 562.

[4] We are of the opinion there was no substantial evidence of an intent to defraud. The prosecution was required to establish beyond a reasonable doubt that defendant intended to defraud Von's Market, not some other corporation or individual. The evidence negatives any intent to defraud Von's Market. When the check of October 1st was written on the wrong branch of the Bank of America and defendant discovered that fact, he immediately informed Munstenteiger; the name of the branch was changed; and the check was honored. This check was for \$25 and defendant neglected to deduct it in his check book. The next day after writing the check of October 10th, defendant deposited \$70.98 in his account. For some reason not disclosed, the prosecution did not introduce the bank record of defendant's account in evidence. Shortly after writing the check of October 16th, defendant went to Munstenteiger and told him the checks of the 10th and 16th would be returned and that they would be taken care of that week end when he received his pay check. Munstenteiger told him not to worry about it, that they would be taken care of. Defendant received his pay check on Friday, the 24th, but before he could deposit it he was incarcerated and then arrested on the present charges. Defendant covered the checks of the 10th and 16th immediately on his release on Monday, November 3rd. Prior to defendant's arrest all checks he had presented to Munstenteiger had been honored, with the exception of those of the 10th and 16th; some went through and some did not. "As to those checks which did not go through," Von's Market simply sent them through again and they were honored. When Munstenteiger authorized payment of the checks of the 10th and 16th he was not deceived. He knew they might be dishonored on first presentation for payment and later paid. On these facts, the evidence with respect to defendant's transactions with his landlady does not indicate an intent to defraud Von's Market. When he was informed by his landlady that one of his

checks to her had been dishonored and that the other one would be, he gave her the amount of them in cash.

[5] Intent to defraud is an intent to commit a fraud. " 'As defined by lexicographers, the word "defraud" means to deprive of right, either by procuring something by deception or artifice, or by appropriating something wrongfully.' " *People v. Wilkins*, 67 Cal.App. 758, 762, 228 P. 367, 368. The record is devoid of any evidence of deception or artifice. The most the evidence convicted defendant of is carelessness, negligence, and being a poor bookkeeper. Munstenteiger was not deceived. If this conviction were to stand, many a reputable individual would be subject to criminal prosecution for mere carelessness and poor bookkeeping.

The judgment is reversed.

SHINN, P. J., and WOOD, J., concur.



120 Cal.App.2d 855

MONTGOMERY v. NORMAN.

Civ. 4828.

District Court of Appeal, Fourth District,
California.

Oct. 27, 1953.

Rehearing Denied Nov. 20, 1953.

Proceeding to set aside default judgment. The Superior Court, San Diego County, Robert B. Burch, J., entered order setting aside default judgment, and plaintiff appealed. The District Court of Appeal, Griffin, J., held that where defendant was allowed ten days after notice of filing of undertaking bond in which to plead to amended complaint, and notice of filing was mailed in Beverly Hills on March 10, to defendant in Los Angeles, defendant was not in default for failure to plead before March 23, in view of statute granting one

extra day for every 100 miles distance between place of deposit and place of address, and fact that March 21 and 22 were legal holidays on which defendant was unable to plead.

Order affirmed.

1. Judgment ⇨106(2)

Where defendant was allowed ten days after notice of filing of undertaking bond in which to plead to amended complaint, and notice of filing was mailed in Beverly Hills, on March 10, to defendant in Los Angeles, defendant was not in default for failure to plead before March 23, in view of statute granting one extra day for every one hundred miles distance between place of deposit and place of address, and the fact that March 21 and 22 were legal holidays on which defendant was unable to plead. Code Civ.Proc. §§ 12-12b, 585, 1012, 1013.

2. Judgment ⇨103

Where service is by mail and both parties have offices in same city, time within which act required by service may be done, is extended one day, and clerk is not authorized to enter default or default judgment until time for appearance has expired. Code Civ.Proc. §§ 12-12b, 585, 1012, 1013.

3. Judgment ⇨381, 391

Judgment which is void on its face, does not require that person seeking to have such judgment set aside, file affidavit of merits in connection with motion as judgment may be vacated upon motion, or may be set aside by court on its own motion.

4. Judgment ⇨346

Judgment void on its face, is not governed by Civil Procedure Code section granting relief from judgments taken by mistake, inadvertence, surprise or excusable neglect and providing for correction of clerical mistakes in judgments or orders. Code Civ.Proc. § 473.

5. Judgment ⇨158

Where judgment in action for money claimed due on contract was void on its face by reason of improper default entered

by clerk of court, opposing party was not required to file affidavit of merits in connection with motion to set aside default and default judgment.

Charles A. Prince, Beverly Hills, Joe Mayer, Los Angeles, for appellant.

Tudor Gairdner, Los Angeles, for respondent.

GRIFFIN, Justice.

On January 23, 1953, plaintiff filed a complaint for money claimed due on a contract which was made payable in Texas. He obtained a writ of attachment and attached certain real property of defendant. Defendant filed a motion to require security for costs and to have the writ of attachment discharged, and filed a demurrer to the complaint on February 11. On February 18, prior to the ruling on the demurrer, plaintiff filed an amended complaint containing an additional allegation that defendant, in California, orally agreed to pay the amount claimed. On February 25, the hearing was had on the demurrer and pending actions. The motion to quash the writ was denied without prejudice. The demurrer was sustained and plaintiff was ordered to deposit an undertaking for costs within 30 days. Some confusion arises in reference to the time given defendant to plead to the amended complaint. The rough minutes of the clerk indicate (1) that plaintiff was to post the bond "within 30 days" from February 25th; (2) "Demurrer is sustained, 10 days to plead to amended complaint". Defendant gave notice to plaintiff of the ruling on the demurrer and that the court had granted defendant Norman "10 days after notice of filing undertaking within which to plead to amended complaint". On March 10, 1953, plaintiff mailed to defendant's attorney a notice that he had filed the cost bond required. On (Sunday) March 22, 1953, plaintiff mailed to the clerk of the court a request to enter default of defendant, and on Monday, March 23, at 9 a. m. the clerk entered the default, and on March 25th,

entered judgment by default. Defendant, on March 23, mailed a demurrer to the amended complaint to the county clerk, and a copy to plaintiff. It was not until April 1st, 1953, when the parties were arguing the demurrer before the court, that defendant was apprised of the default. Thereafter, he moved to set it aside and also the judgment that followed, on the grounds that the default was prematurely entered by the clerk. Counsel for plaintiff admitted in his affidavit, on the hearing, that the court granted defendant ten days after notice of filing the undertaking within which to answer the amended complaint, and alleges that such notice was mailed on March 10, and was received by defendant on March 11.

It is plaintiff's argument that on March 10th, notice of the filing of the undertaking by mail from Beverly Hills to counsel for defendant in Los Angeles was given; that the time to answer expired on March 20, and that service by mail was complete at the time of the deposit in the post office; that defendant was therefore in default on March 23rd, and that it was timely and properly entered by the clerk, citing secs. 585, 1012, and 1013 of the Code of Civil Procedure and such cases as *Gossman v. Gossman*, 74 Cal.App.2d 233, 168 P.2d 495; and *McDonald v. Lee*, 132 Cal. 252, 64 P. 250.

Defendant concedes that service may be made by mail and the service is complete at the time of deposit, but contends that Sec. 1013, *supra*, provides that "if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day, together with one day additional for every full 100 miles distance between the place of deposit and the place of address, if served by different

post offices, but such extension shall not exceed thirty days in all."

[1,2] The claim is that by taking advantage of the extra day so allowed, the tenth day fell on March 21, 1953, which was on Saturday, a legal holiday on which the county clerk's office was closed, and since Sunday was also such a holiday defendant had all day Monday, March 23, in which to appear, Secs. 12, 12a and 12b, C.C.P.; that notwithstanding this fact, the clerk erroneously entered default on that morning, which act was in excess of his power and void. The court so found and the authorities support this claim. *Lacoste v. Eastland*, 117 Cal. 673, 49 P. 1046; *Schoutens v. Superior Court*, 97 Cal.App.2d 855, 857, 218 P.2d 999; *Bulpitt v. Blatz*, 86 Cal.App.2d 41, 194 P.2d 601. In the *Bulpitt* case it was succinctly stated that "Where service is by mail, and both parties have offices in the same city, the time within which an act may be done by the adverse party is extended one day." The clerk is not authorized to enter a default or a default judgment until the time for appearance has expired. If the clerk enters such a judgment without such authority the judgment is void. *Bond v. Pacheco*, 30 Cal. 530; 15 Cal.Jur. p. 52, § 140.

[3-5] The only remaining claim is that defendant did not file an affidavit of merits in connection with his motion to set aside the default and default judgment. A judgment, void on its face, is not governed by Code of Civil Procedure § 473. *Stierlen v. Stierlen*, 18 Cal.App. 609, 124 P. 226, 228. Such a judgment may be vacated upon motion or may be set aside by the court on its own motion. *Stearns v. Aguirre*, 7 Cal. 443. Under such circumstances no affidavit of merits is required.

Order affirmed.

BARNARD, P. J., concurs.

120 Cal.App.2d 807

MARSHALL v. VON ZUMWALT et al.

Civ. 19574.

District Court of Appeal, Second District,
Division 2, California.

Oct. 26, 1953.

Action by person for whom home was built against contractor for amount loaned to contractor to procure lots and for reasonable value of services rendered in aiding in construction work. The Superior Court, Los Angeles County, Alfred E. Paonessa, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held, *inter alia*, that defendant would be permitted to assert contract, under which plaintiff owed them more than plaintiff sought to recover, as a defense, though there was no evidence showing that defendant at time of performance of contract was licensed.

Affirmed.

1. Licenses ⇨39.43

Statute prohibiting contractor from maintaining action for collection of compensation for performance of a contract for which license is required without alleging and proving that he was licensed at time of performance of contract does not prohibit contractor when sued from setting up as a defense any sums which may be equitably due him from plaintiff upon such illegal contract, and such a contract is not *malum in se*, but is merely *malum in prohibitum*. Business and Professions Code, § 7031.

2. Licenses ⇨39.43

Where person for whom home was built sued contractor for amount loaned contractor to procure lots and for value of services rendered to contractor in aiding in construction, contractor would be permitted to assert contract, under which plaintiff owed contractor more than plaintiff sought to recover, as a defense, though there was no evidence showing that contractor at time of performance of contract was licensed. Business and Professions Code, § 7031.

3. Payment ⇨59, 63(3)

It is not necessary to plead payment specifically in an answer, and evidence of payment may be shown under general denial of allegations of complaint.

4. Payment ⇨63(3)

In action by person for whom home was built against contractor to recover amount loaned to contractor for procurement of lots and to recover value of plaintiff's services rendered in connection with construction work, where contractor generally denied in his answer the essential allegations of the complaint, court properly permitted him to produce evidence showing that plaintiff had been credited for such items on the amount owed defendant under the construction contract, though answer did not specifically allege payment.

5. Appeal and Error ⇨1170(3)

In view of fact that evidence of payment was admissible under general denial of allegations of complaint, plaintiff was not prejudiced by amendment of answer to conform to proof by alleging that plaintiff had been paid sums due him. Const. art. 6, § 4½.

6. Appeal and Error ⇨959(1)**Pleading** ⇨236(1)

Amendments to pleadings rest in sound discretion of trial court whose ruling will not be disturbed in absence of showing of abuse of discretion.

7. Pleading ⇨237(6)

Trial court did not abuse its discretion in permitting defendant to amend answer to conform to proof by alleging that plaintiff had been paid any sums due him.

Sidney L. Gelber, San Fernando, for appellant.

Nathan Kates & Gerald B. Tannen, San Fernando, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in an action to recover for (1) \$1,400, loaned to defendants, and (2) \$100 for the

sonable value of work, labor and services performed for defendant William Von Zumwalt, plaintiff appeals.

Viewing the testimony most favorable to defendants (respondents) the record discloses that defendant Von Zumwalt agreed to construct a house for plaintiff and plaintiff's wife; plaintiff advanced to defendant money to purchase two lots, one for plaintiff's home and one for defendant's home; plaintiff further worked on his own home in accordance with an agreement whereby defendant would not pay him with cash, but would credit him with the value of his work toward the price of his home or extras ordered.

Subsequently plaintiff's home was constructed by defendant and plaintiff was charged with extras in the sum of \$2,113.09, against which was credited the sum of \$1,400 and \$100.

The trial court found that plaintiff did lend to defendant the sum of \$1,400 and plaintiff performed work, labor and services for defendant in the reasonable value of \$100, and further found that such sums were paid by defendant's crediting plaintiff with such amounts against extras ordered by plaintiff during construction of his home.

When plaintiff rested, the court, on defendant's motion, dismissed defendant's cross-complaint predicated upon the contract to build a house for plaintiff.

Thereafter defendant introduced testimony showing that he had credited plaintiff with \$1,500 against a sum in excess thereof which plaintiff owed defendant for constructing a house for him.

Questions: First: *Did the trial court err in admitting in evidence testimony concerning a building contract, under the terms of which plaintiff owed defendant in excess of \$1,500 and against which defendant had credited plaintiff with the sum of \$1,500 alleged to be due plaintiff in the complaint in the present action, for the reason there was no evidence that defendant was a duly licensed contractor?*

No. Section 7031 of the Business and Professions Code of California reads as follows: "No person engaged in the business or acting in the capacity of a con-

tractor, *may bring or maintain any action in any court of this State* for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." (Italics added.)

[1] It is to be noted that the statute merely prohibits a contractor from maintaining or bringing an action upon a contract which he has entered into pertaining to the contracting business. It does not prohibit him when sued from setting up as a defense any sums which may be equitably due him from the plaintiff upon such illegal contract. Such a contract is not *malum in se* but merely *malum prohibitum*.

The applicable rule is thus stated in 12 American Jurisprudence (1938), Contracts, sec. 158, p. 654, as follows: "Contracts made in violation of statutes, if not *malum in se*, are sometimes held valid, and generally so, notwithstanding the infraction of law, whenever it becomes necessary to save from injury persons for whose protection the violated statutes were enacted or whenever the public interests require that such contracts shall be enforced."

[2] It is clear that equity and justice require that plaintiff be charged for the benefits which he has received from defendant and defendant be credited with the value of services and materials which he has furnished to plaintiff. There is no question of public interest or public policy involved in the instant case. It is purely a matter of balancing the rights and equities between the parties.

[3,4] Second: *Did the trial court err in denying plaintiff's motion to strike defendant's exhibits and testimony concerning the building contract between the parties, for the reason that the same was new matter and not admissible under defendant's general denial of the allegations of plaintiff's causes of action?*

No. It is not necessary to plead payment specifically in an answer. Evidence of payment may be shown under a general

denial of the allegations of the complaint. (Snodgrass v. Snodgrass, 81 Cal.App. 360, 363[2], 253 P. 755.) In the instant case defendant generally denied in his answer the essential allegations of plaintiff's complaint. Therefore the foregoing rule is applicable.

[5-7] Third: *Did the trial court commit prejudicial error in permitting defendant during the trial to amend his answer to conform to the proof by alleging that plaintiff had been paid any sums due him?*

No, For two reason: (1) As set forth in answer to question Second, supra, such evidence was admissible without any pleading, therefore plaintiff was not prejudiced by the amendment and any error in it must be disregarded by the court under the provisions of Article VI, section 4½ of the Constitution of the State of California; (2) The rule is settled that amendments to pleadings rest in the sound discretion of the trial court whose ruling will not be disturbed in the absence of a showing of abuse of discretion. (Fetterley v. Gibson, 210 Cal. 282, 283[3], 291 P. 411.) In the instant case there is no showing that the trial court abused its discretion.

Affirmed.

MOORE, P. J., and FOX, J., concur.



120 Cal.App.2d 893

MILLARD v. DETHER.

Civ. 19661.

District Court of Appeal, Second District,
Division 2, California.

Oct. 29, 1953.

Hearing Denied Dec. 23, 1953.

Action for an accounting and recovery of money due plaintiff as commissions under a contract of employment as defendant manufacturer's sales representative. From a judgment of the Superior Court of Los Angeles County, David Coleman, J., for plaintiff, defendant appealed. The District

Court of Appeal, McComb, J., held that plaintiff's testimony, contrary to defendant's evidence, supported the trial court's finding construing an ambiguous provision of the contract as to the amounts of commissions agreed to be paid plaintiff, so that the finding was binding on appeal.

Judgment affirmed.

1. Evidence ⇨458

A provision in contract of employment as manufacturer's sales representative for payment to him of 10% of gross amount of all orders or contracts secured through his efforts, less 50% to be paid him on increased amounts of prices over manufacturer's original quotations, was ambiguous as to whether plaintiff was to receive 10% of gross amount of his sales, less 50% on increased amount of original quotations, or 10% of gross amount after deducting 50% of amount paid him on increased prices obtained by him over such quotations, so as to authorize showing by parol evidence of circumstances under which contract was made, including situation of subject of and parties to it. Code Civ.Proc. § 1860.

2. Appeal and Error ⇨1008(3)

Principal and Agent ⇨89(8)

In action for commissions alleged to be due plaintiff as sales representative of defendant manufacturer, plaintiff's testimony, received without objection, supported trial court's finding construing ambiguous provision of contract as to amounts of commissions agreed to be paid plaintiff and, being contrary to defendant's evidence, was binding on appeal from judgment for plaintiff. Code Civ.Proc. § 1860.

3. Appeal and Error ⇨1008(3)

Where extrinsic evidence, introduced for purpose of interpreting an agreement, or inferences therefrom are conflicting, issue is one of fact, and trial court's finding consistent with evidence is binding on appeal.

Bertram H. Ross, Los Angeles, for appellant.

Obegi & High, Van Nuys, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for an accounting and to recover money allegedly due plaintiff pursuant to a contract entered into between the parties, defendant appeals.

Judgment was entered in favor of plaintiff for \$9,775.75.

Facts: Plaintiff, pursuant to two agreements, one dated July 21, 1950, and the other September 16, 1950, undertook to act for defendant as a sales representative at a commission fixed by the agreements. The first agreement provided that it was a tentative agreement and subject to change 60 days from the date of signing. It provided that plaintiff should receive a commission of 10% on gross sales accredited to him. The second agreement read thus:

"Agreement

"I the undersigned Arthur F. Dether doing business as the D & M Manufacturing Company, do hereby agree to pay H. E. Millard (50%) fifty percent of any increase in prices of any and all bids or work contracts the D & M Manufacturing Company secures through the efforts of H. E. Millard.

"Also on all orders or contracts of the above nature H. E. Millard is to receive (10%) ten percent of the gross amount less the (50%) fifty percent to be paid him on increased amounts prices over the original quotations by Arthur F. Dether.

"Signed this 16th day of September 1950

"D & M Manufacturing Company
"A. F. Dether."

The trial court after receiving parol evidence of the intention of the parties, for the purpose of determining the ambiguity in the second paragraph of the agreement of September 16, 1950, made the following finding:

"The Court finds that on or about the 16th day of September, 1950, plaintiff and defendant entered into an amendment to the agreement of July 21, 1950, in writing, whereby defendant agreed to pay plaintiff a commission of fifty (50%) per cent of any and all amounts over and above the

bid price quoted by defendant on all contracts secured through the efforts of plaintiff; that on all such contracts an amount equal to said commission of fifty (50%) per cent of the increased amount would be deducted from the total gross sales amount and a further commission of ten (10%) per cent of the balance would be paid to the plaintiff by the defendant."

[1] *Question: Was the provision in the agreement of September 16, 1950, ambiguous which read thus: "Also on all orders or contracts of the above nature H. E. Millard is to receive (10%) ten percent of the gross amount less the (50%) fifty percent to be paid him on increased amounts prices over the original quotations by Arthur F. Dether?"*

Yes. The agreement is not clear and explicit. From a reading thereof it is not apparent whether the parties intended that plaintiff was to receive 10% of the gross amount of his sales, less 50%, to be paid him on increased amount of original quotations, or that he was to receive 10% of the gross amount after deducting 50% of the amount paid him on increased prices which he obtained over the original quotations by defendant.

[2,3] Under such a state of facts section 1860 of the Code of Civil Procedure that "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret", is applicable.

Pursuant to this provision, the trial judge received parol evidence as to the intention of the parties at the time the agreement was executed. Plaintiff testified as follows: "Say, for instance, Mr. Dether would bid \$2.00 and I figured it out where I figured the bid should be \$3.00, so the difference between Mr. Dether's bid and my bid was \$1.00, so that we split the dollar in half, which would be fifty cents. That would be 50 cents I would receive so I would subtract the 50 cents I received from the \$3.00, and charge him 10 per cent on the

two dollars and a half, because I didn't think it would be fair to charge him 10 per cent on something I had already received."

Such evidence was received without objection and in view of the ambiguity in the instrument supports the trial court's finding noted above. Such evidence was contrary to that given by defendant with the result that we are bound by the interpretation of the contract adopted by the trial court, the rule being settled that where extrinsic evidence has been introduced for the purpose of interpreting an agreement and such evidence or the inferences therefrom are conflicting, the issue is one of fact and the finding of the trial court consistent with the evidence is binding upon appeal. (Crillo v. Curtola, 91 Cal.App.2d 263, 272 [3], 204 P.2d 941; Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370 [1], 210 P.2d 757 (hearing denied by the Supreme Court); In re Estate of Rule, 25 Cal.2d 1, 11 [4], 152 P.2d 1003, 155 A.L.R. 1319.)

Affirmed.

MOORE, P. J., and FOX, J., concur.



121 Cal.App.2d 55

PEOPLE v. HERNANDEZ.

Cr. 942.

District Court of Appeal, Fourth District,
California.

Nov. 3, 1953.

Defendant was convicted of driving a motor vehicle while under the influence of intoxicating liquor, and from the judgment of the Superior Court of San Bernardino County, Martin J. Coughlin, J., defendant appealed. The District Court of Appeal, Barnard, P. J., held that the evidence was sufficient to support the judgment.

Judgment affirmed.

1. Automobiles ⇨355(6)

In prosecution for driving motor vehicle while under influence of intoxicating liquor, evidence was sufficient to justify inference by trial court beyond reasonable doubt that defendant was driver of automobile from which an intoxicated person was taken after collision between such automobile and another automobile. Vehicle Code, § 501.

2. Criminal Law ⇨406(1)

In prosecution for driving motor vehicle while under influence of intoxicating liquor, defendant's admissions to police officer on morning after accident in which automobile alleged to have been driven by him was involved that he owned such automobile, that his driver's license had been cancelled, that he had two drinks before accident and that no one was with him in automobile at time thereof were properly received in evidence as against objections that corpus delicti was not sufficiently established and that such admissions were not sufficiently related to accident in question. Vehicle Code, § 501.

3. Criminal Law ⇨1169(2)

In prosecution for driving motor vehicle while under influence of intoxicating liquor, any error in admitting evidence as to defendant's taking of intoximeter test and chemist's testimony respecting his findings in connection therewith and effect of such findings was not prejudicial to defendant, in view of other strong and convincing evidence of his intoxication at time of automobile collision resulting in prosecution. Vehicle Code, § 501.

4. Automobiles ⇨355(6)

Evidence was sufficient to support judgment of conviction for driving motor vehicle while under influence of intoxicating liquor. Vehicle Code, § 501.

Cunningham, Parry & Holcomb, Charles E. Ward, San Bernardino, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with driving a motor vehicle while under the influence of intoxicating liquor, in violation of section 501 of the Vehicle Code. After a trial, he was found guilty by the court sitting without a jury, and he appeals from the judgment.

This action resulted from a collision which occurred about 10:00 p. m. on June 7, 1952, on Highway 99. At the point involved, this was a divided highway with two traffic lanes each way. The east-bound lanes were separated from the west-bound lanes by "22 feet of dirt island and a difference in elevation" of six feet. At the time in question a sheriff's car driven by a deputy and with two passengers, was proceeding easterly in the southerly lane. A Ford car, which was proceeding east in the same lane about 25 feet ahead of the sheriff's car, suddenly swerved to the left to avoid a Plymouth car which was coming down-grade traveling west on the east-bound lanes. The Plymouth car sideswiped the Ford car and ran headon into the sheriff's car, injuring its three occupants. The sheriff's car and the Plymouth car stopped within six inches of each other, and the Ford car stopped on the island between the two roads.

Several officers arrived at the scene shortly afterward, and the only occupant of the Plymouth car was taken in an ambulance to the county hospital. There was convincing evidence that the defendant was driving the Plymouth car at the time and that he was intoxicated. The driver of the sheriff's car and the driver of the Ford car, within two minutes after the accident, looked into the Plymouth car and saw only one person. This person was on the driver's side, under the steering wheel, with the upper part of his body lying over toward the right side. They did not see any one leave that car. Two officers who removed the man from the Plymouth car testified positively that the defendant was the man they took from the car. One testified that he appeared to be unconscious, and the other testified that he appeared to be in a daze. One testified that he smelled the defendant's

breath at that time and that it was "very strong alcoholic". The other officer testified that he got in the ambulance with the defendant and helped to hold the stretcher in position, and that en route to the hospital the defendant was groggy, "smelled of alcohol and mumbled and singing". Two highway patrol officers saw the defendant at the county hospital about midnight and testified that his breath was alcoholic; that there was a strong odor of alcohol; that his speech was incoherent; that it was hard to understand him; and that he was "wild and hollering" at times. Based on their experience in seeing people under the influence of liquor one expressed the opinion that he was drunk, and the other that he was under the influence of intoxicating liquor.

These highway patrol officers also testified with reference to assisting in taking what is referred to as an "intoximeter" test. A part of this test consisted of having the defendant blow up a rubber balloon so that the contents could later be analyzed when the air was allowed to escape. A chemist, who ran a laboratory, testified that he used the air from this balloon in making various tests by which he could determine the blood-alcohol concentration present in the person breathing the air into the balloon. This witness then testified as to the blood-alcohol content he found and the effect it would have.

Another officer testified that in a conversation at the county hospital the next morning the defendant told him that he owned a 1940 Plymouth; that his driver's license had been cancelled four years before; that he had had two drinks before the accident; that no one was with him in the car; that the accident happened about 4:00 or 5:00 in the afternoon; that he could not remember where the accident happened; and that he could not tell anything more about the accident. He also testified that when asked how the accident happened, the defendant replied "I claim they ran into me."

[1,2] The appellant first contends that the evidence fails to disclose "by reasonable and probable means" that he was operating

the vehicle in question, and that his admissions the next morning should not have been admitted because the "corpus delicti" was not sufficiently established. It is argued that the driver of the sheriff's car was unable to identify him as the person who was in the Plymouth car, and that the testimony of the two officers who identified him as the person they took from the Plymouth car was unworthy of belief because of certain discrepancies in their testimony, and because they were unable to describe certain details of the features and clothing of the person they took from the car. The driver of the sheriff's car was suffering from broken ribs, and was mainly occupied in caring for the other injured occupants of his car. The minor discrepancies appearing in the testimony of these two officers is only natural in view of the circumstances, and the confusion incident to caring for several injured people. It would have been more suspicious if they had told exactly the same story with respect to all minor details, after the lapse of several months. The appellant was positively identified as the person who was removed from the Plymouth car and taken to the hospital, and the evidence was sufficient to justify an inference beyond any reasonable doubt that he was the driver of that car. His admissions the next morning were properly received in evidence. There is no merit to the contention that these admissions were not sufficiently related to the accident here in question, since the appellant's statement that he was driving "when this accident happened" may have had reference to another accident which happened at 4:00 or 5:00 p. m. the preceding after-

noon. In view of the evidence, there could be no reasonable doubt that the appellant was taken to the hospital from the scene of this particular accident.

[3,4] It is next contended that it was error to admit evidence concerning the taking of this intoximeter test because it was taken without appellant's consent, and that it was error to admit the testimony of the chemist with respect to his findings in that connection, and particularly in permitting him to testify concerning the effect of his findings. It is unnecessary to consider at length the various arguments made in this connection. There is some evidence that the appellant consented to this test by voluntarily breathing into the balloon, and the chemist who testified in this connection qualified as an expert witness. In any event, and assuming any error in this connection, it cannot be held to be prejudicial in view of the strong and convincing evidence of intoxication which otherwise appears. In deciding the case, the trial judge reviewed the evidence on intoxication, including many corroborating circumstances, and then observed that the evidence concerning the intoximeter test was further corroboration. The judge correctly summarized the evidence on this issue when he said: "He was so intoxicated that he didn't even know what had happened or where he was or at what time it took place." The evidence amply supports the judgment and no reversible error appears.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

41 Cal.2d 648

McCRACKEN v. TEETS, Warden.
S. F. 18788.

Supreme Court of California.
In Bank.

Nov. 6, 1953.

Petition for mandate to compel warden of state prison to institute proceedings for an inquiry into sanity of petitioner who had been delivered for execution. The Superior Court, Marin County, N. Charles Brusatori, J. pro tem., denied the mandate and petitioner appealed. The Supreme Court, Schauer, J., held that duty of warden, with reference to instituting a sanity investigation, depended on whether there was "good reason to believe" that petitioner had become insane, and not on fact of insanity, and the determination, in accord with presumption that warden had regularly performed his duty, was not overcome.

Judgment affirmed.

Traynor, Carter and Spence, JJ., dissented.

1. Criminal Law ⚖️981(2)

The duty of warden of state prison, with reference to instituting sanity investigation of a defendant delivered to him for execution, depends not on the fact of insanity, but on fact of whether there is "good reason to believe" that a defendant has become insane. Pen.Code, § 3701.

2. Appeal and Error ⚖️717

The findings of the trial court cannot be impugned by an antecedent erroneous expression by the trial judge.

3. Criminal Law ⚖️981(2)

A finding that warden of state prison, to whom a prisoner had been delivered for execution, had no reason to believe that prisoner was other than sane, was, under all the circumstances, the substantial equivalent of a finding that there was not in fact "good reason to believe" that the prisoner had become insane. Pen.Code, § 3701.

4. Criminal Law ⚖️322

In the absence of a showing to the contrary, it must be presumed that warden,

to whom prisoner has been delivered for execution, performed his duty of making initial determination, in the exercise of his sound discretion, whether there was good reason to believe that prisoner had become insane and thus was entitled to have his sanity inquired into. Pen.Code, § 3701.

5. Mandamus ⚖️168(2)

In order for petitioner for mandamus to compel warden of state prison to institute proceeding for inquiry into his sanity to prevail on appeal from judgment based on conflicting evidence as to whether warden had good reason to believe that petitioner had become insane since delivered for execution, it was incumbent upon petitioner to show that there was no substantial evidence to support determination of such question adverse to him and that evidence impelled finding that there was good reason to believe that he was insane. Pen.Code, § 3701.

6. Mandamus ⚖️168(4)

In mandamus proceeding to compel warden of state prison to institute proceedings for inquiry into sanity of petitioner who had been delivered to warden for execution, evidence did not impel finding that warden had "good reason to believe" that petitioner had become insane but sustained determination adverse to petitioner. Pen.Code, § 3701.

7. Appeal and Error ⚖️891

Provision of Code of Civil Procedure permitting appellate courts to take evidence in certain cases was not intended to transmute reviewing courts into trial courts. Code Civ.Proc. § 956a.

8. Constitutional Law ⚖️272

Federal due process does not accord a prisoner, who has been delivered to warden of state prison for execution, a right of judicial review of question whether warden had "good reason to believe" that he has become insane and that his sanity therefore should be inquired into. Pen.Code, § 3701.

George H. Chula and James C. Monroe, Santa Ana, for petitioner.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioner is confined under a judgment which imposes the death sentence for first degree murder. He has appealed from a judgment which denies his petition for mandate to compel the warden of San Quentin to institute proceedings for an inquiry into his sanity, and the attorney general has moved in the alternative to dismiss the appeal as frivolous on its face (see *People v. Shorts* (1948), 32 Cal.2d 502, 506, 516, 518, 197 P.2d 330; *Williams v. Duffy* (1948), 32 Cal.2d 578, 583, 197 P.2d 341; *People v. Adamson* (1949), 34 Cal.2d 320, 338, 210 P.2d 13) or, on like grounds, to affirm the judgment denying mandate. We have determined, under all the circumstances of this case, to deny the motion to dismiss the appeal and to consider the cause on its merits. Upon such consideration it appears that the judgment must be affirmed.

After the judgment of conviction was affirmed (*People v. McCracken* (1952), 39 Cal.2d 336, 246 P.2d 913) and a date for execution of sentence was set, the superior court stayed execution to permit a hearing of the petition for mandate. Petitioner relied upon the statutory rule which peremptorily forbids execution of a person while he is insane (Pen.Code, § 1367) and the implementing rule that "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden *must* call such fact to the attention of the district attorney

* * *," and the latter official "*must*" initiate proceedings which lead to a jury hearing on the issue of insanity (Pen.Code, § 3701; italics added).

As is hereinafter explained, the situation is materially similar to that in *Williams v. Duffy* (1948), supra, 32 Cal.2d 578, 197 P.2d 341, although the appeal here appears to have been taken in the sincere belief by counsel that, because of uncertainty as to procedural law, it was necessary to protect petitioner's rights, and was not instituted or carried on as part of a mere calculated campaign for delay. The evidence before the trial court, as petitioner concedes, was in substantial conflict.¹ At the close of evidence the trial judge (apparently being of the mistaken belief that the law placed upon the warden the responsibility of determining the fact of sanity), stated, "the law throws upon the Warden * * * the decision as to whether in his opinion—not yours, not mine, not the other fellow's—in his opinion *whether the man has become insane* after he has been received at the institution on a judgment of death. * * * I believe this Court has to determine now whether or not there has been an abuse of discretion by the Warden." (Italics added.) Thereafter the court found that the warden "has no reason to believe that petitioner is other than sane"; that petitioner "knows the crime for the commission of which he has been convicted and the punishment which he is about to suffer"; and that petitioner is sane.

[1-3] As was pointed out in *Williams v. Duffy* (1948), supra, p. 579 of 32 Cal.2d, 197 P.2d 342, "the warden's duty, as prescribed by * * * section [3701], de-

1. Such evidence was as follows: The court observed petitioner, who was present at the hearing but either unable or unwilling to answer questions, except that he shook his head indicating negative response to his counsel's question, "Do you know where you are?" Petitioner's counsel and a psychiatrist testified that in their opinions petitioner was insane. The warden testified that in his opinion, based on his own observation and on information which he had received from

prison psychiatrists and physicians, petitioner was sane. The chief medical officer and the chief psychiatrist of San Quentin testified that in their opinions petitioner was sane. In evidence, without objection of petitioner, were reports of prison psychiatrists and the prison's chief medical officer; the reports state the results of examinations of petitioner made from time to time after the date of his execution had been fixed and the conclusions that petitioner was sane.

pende not on the fact of insanity, but on the fact as to whether 'there is good reason to believe that a defendant * * * has become insane.' " (See also *Phyle v. Duffy* (1948), 334 U.S. 431, 443, 68 S.Ct. 1131, 92 L.Ed. 1494.) It is urged that the above quoted statements of the trial judge show that he "was mistaken as to the extent of his review or the issue before him at that mandamus hearing," and that the findings do not determine the controlling question: Was there "good reason to believe" that petitioner, after judgment, had become insane? The findings cannot be impugned by the antecedent erroneous expression of the trial judge. (*Strudthoff v. Yates* (1946), 28 Cal.2d 602, 615-616, 170 P.2d 873; *Southern California Jockey Club v. California, etc., Racing Bd.* (1950), 36 Cal. 2d 167, 174, 223 P.2d 1.) It is true that there is not, as there should be, a finding expressly determining the controlling issue. However, as is hereinafter explained, the finding that the warden "has no reason to believe that petitioner is other than sane" must, in the light of the other circumstances here shown, be held to be the substantial equivalent of a finding that there was not in fact "good reason to believe" that petitioner had become insane.

[4] As appears from the statute (Pen. Code, § 3701) and the holding of this court in *Williams v. Duffy* (1948), supra, p. 580 of 32 Cal.2d, 197 P.2d 343, it is for the warden initially to determine, in the exercise of his sound discretion, whether there is "good reason to believe" that a defendant has become insane. In the absence of a showing to the contrary we must presume that the warden regularly performed his duty. (See Code Civ.Proc., § 1963, pars. 15, 33.) There is no contention that the warden absented himself from the prison or refused to take cognizance of pertinent evidence available to him, or that the finding that the warden "has no reason to believe that petitioner is other than sane" is in any way related to an absence from duty or refusal to consider available evidence. Therefore, such finding (that the warden, presumably acting in accord with the facts and law, had no reason to believe that petitioner was insane) implies a finding that

there was in fact no good reason to believe otherwise. (See *Reiniger v. Hassell* (1932), 216 Cal. 209, 211, 13 P.2d 737.)

[5, 6] Here, as in the *Williams* case, supra, the evidence which relates to the controlling question whether there was "good reason to believe" that petitioner had become insane, including the testimony of experts, is in conflict. In order to prevail on appeal from the judgment based on such evidence, and the necessarily implied finding against him on such question, petitioner would have to show that there is no substantial evidence to support the determination of the question adverse to him, and that the evidence impels a finding that there was good reason to believe that he was insane (p. 581 of 32 Cal.2d, 197 P.2d 343). This petitioner cannot do upon the record.

[7] Although he has not served and filed an application to produce additional evidence pursuant to Rule 23(b) of the Rules on Appeal, petitioner asserts (citing Code Civ.Proc., § 956a) that he could produce evidence relating to his mental condition after the rendition of the superior court judgment in this proceeding which would establish good reason to believe that he is insane. Affidavits of petitioner's counsel and a psychiatrist have been presented by petitioner and reports of prison doctors and psychiatrists have been presented by the attorney general. Examination of those documents, which concern petitioner's mental condition and the treatment thereof since the rendition of the judgment denying mandate, shows that the additional evidence, if formally produced, would be, as was the evidence before the trial court, in conflict. This case is before us on appellate review, not as a matter of original jurisdiction. Hence, it would be inappropriate for this court to undertake to resolve the conflict. It was not intended by enactment of section 956a "that the reviewing courts should develop generally into trial courts." (*Tupman v. Haberkern* (1929), 208 Cal. 256, 269, 280 P. 970.)

[8] Petitioner asserts that he is denied due process of law if he is not accorded judicial review of the question whether

there is good reason to believe that he has become insane. It has been held that federal due process accords him no such right. (*Solesbee v. Balkcom* (1950), 339 U.S. 9, 12, 70 S.Ct. 457, 94 L.Ed. 604.) Nevertheless, in this proceeding it has been accorded him.

Inasmuch as the circumstances of this case have brought the entire cause before us, and inasmuch as the record, as above noted, indicates an erroneous view by the trial judge of the duty of the warden in the premises and does not contain a finding expressly resolving the controlling issue, it appears proper to deny the motion to dismiss the appeal. However, after consideration of the entire record, we are satisfied that petitioner has not been prejudiced by the errors noted.

For the reasons above stated, the motion to dismiss the appeal is denied. Likewise for reasons above stated, the judgment appealed from is affirmed. The stay of execution heretofore granted is terminated.

GIBSON, C. J., and SHENK and EDMONDS, JJ., concur.

TRAYNOR, Justice (dissenting).

Humanitarian considerations have led the Legislature to extend to persons under judgment of death the privilege of avoiding punishment while insane. Penal Code, § 1367. The warden of the state prison is charged with the responsibility of determining whether there is good reason to believe that a person under judgment of death has become insane. Penal Code, § 3701. Mandamus cannot properly issue to compel the warden to institute proceedings under section 3701, since the courts are prohibited from suspending the execution of a judgment of death (Penal Code, § 3700), and are without power, except as provided by statute, to determine the sanity of a per-

son sentenced to death and in the custody of the warden. In *re Phyle*, 30 Cal.2d 838, 846, 186 P.2d 134; see, *People v. Sloper*, 198 Cal. 601, 608, 246 P. 802. A person under judgment of death does not have a constitutional right to have execution of sentence suspended on the ground that he has become insane. *People v. Riley*, 37 Cal.2d 510, 514, 235 P.2d 381; *Phyle v. Duffy*, 34 Cal.2d 144, 157, 208 P.2d 668, concurring opinion. Procedural due process does not prevent delegation of the duty of determining the sanity of a person under judgment of death to an administrative official and does not require judicial review of that official's determination. *Solesbee v. Balkcom*, 339 U.S. 9, 12-13, 70 S.Ct. 457, 94 L.Ed. 604; *Nobles v. Georgia*, 168 U.S. 398, 405-409, 18 S.Ct. 87, 42 L.Ed. 515; In *re Phyle*, supra, 30 Cal.2d at pages 847-850, 186 P.2d at pages 139-141; *Phyle v. Duffy*, supra, 34 Cal.2d at pages 159-161, 208 P.2d at pages 676-678.

Since the court had no jurisdiction to entertain the proceeding, I would reverse the judgment and direct the trial court to dismiss the proceeding. In *re McGee*, 36 Cal.2d 592, 599, 226 P.2d 1.

SPENCE, J., concurs.

CARTER, Justice.

I dissent.

Since I am firmly of the opinion that mandamus is not available to determine the sanity of a person under sentence of death and that habeas corpus is the only remedy available to such a person, I would reverse the judgment with directions to the trial court to dismiss the proceeding. As a basis for this conclusion I adopt the reasoning and the views expressed by Mr. Justice Schauer in his concurring and dissenting opinion in *Phyle v. Duffy*, 34 Cal.2d 144, at page 163 et seq., 208 P.2d 668, at page 679, in which I concurred.

121 Cal.App.2d 98

POSTIER et al. v. LANDAU.

Civ. 19689.

District Court of Appeal, Second District,
Division 3, California.

Nov. 4, 1953.

Action was brought to recover for personal injuries and property damage sustained in head-on collision of automobiles on snow-covered highway. The Superior Court of Los Angeles County, Wilbur C. Curtis, J., entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Vallée, J., held that evidence sustained verdict.

Affirmed.

1. Appeal and Error ⇨930(1)

Where only assignment of error by appealing plaintiffs was that evidence was insufficient to support verdict for defendant, District Court of Appeal would consider evidence and reasonable inferences therefrom in light most favorable to defendant.

2. Appeal and Error ⇨995

An appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over testimony of apparently credible witnesses.

3. Appeal and Error ⇨995

Mere fact that admitted circumstances make story of witnesses seem improbable, will not justify reversal by an appellate tribunal on ground that verdict is contrary to the evidence.

4. Appeal and Error ⇨995

Testimony is not inherently improbable, so as to warrant its rejection by reviewing court, unless things related or described by witness could not have occurred.

5. Appeal and Error ⇨995

To warrant appellate court's rejection of witness' statements, believed by trial court, as inherently improbable, their truth must be physically impossible or their falsity must be apparent without resorting to inferences or deductions.

6. Appeal and Error ⇨994(2, 3)

'Conflicts in witness' testimony and even the testimony subject to justifiable suspicion do not justify reversal of judgment, as determination of witness' credibility and truth or falsity of facts on which determination depends is exclusive province of trial judge or jury.

7. Appeal and Error ⇨995

Unless District Court of Appeal on appeal by plaintiffs from judgment for defendant in action for personal injuries and property damage sustained in head-on collision of automobiles, could say that, under undisputed physical facts, defendant was negligent and that plaintiffs were not contributorily negligent, District Court of Appeal would be required to affirm judgment, and it was not sufficient for reversal that story told by defendant and his wife may have been improbable.

8. Automobiles ⇨244(10)

In action to recover for personal injuries and property damage sustained in head-on collision between automobiles on snow-covered highway, evidence sustained verdict for defendant.

9. Appeal and Error ⇨995

District Court of Appeal could not reverse judgment in favor of defendant in action for damages arising out of head-on collision of automobiles, on ground that implied findings of jury were unsupported by evidence, unless District Court of Appeal could say that facts impliedly found contravened recognized physical laws and that collision could not have happened in manner described by defendant and his wife.

10. Appeal and Error ⇨995

Fact that jury and trial judge rejected evidence, which would have supported findings in favor of plaintiffs, did not impeach soundness of conclusions of jury and trial judge on appeal by plaintiffs from judgment for defendant.

11. Appeal and Error ⇨995

A choice by trier of fact between two permissible views of the evidence is not error.

A. J. O'Connor, Los Angeles, for appellants.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment entered on a verdict of a jury in an action for damages for personal injuries and damage to property arising out of a collision between two automobiles.

[1] The only assignment of error is that the evidence is insufficient to support the verdict. Pursuant to the frequently repeated rule, the evidence and the reasonable inferences therefrom will be stated in the light most favorable to defendant-respondent.

The accident occurred about 12:30 p. m. on January 11, 1951, in the apex of a curve on the East Rim Drive of the Grand Canyon, a snow-covered highway in Arizona. The day was overcast, but visibility was good. The highway at the scene of the collision was 18 feet wide in pavement, with shoulders on both sides. It was covered with about four inches of fresh snow. The center line was not visible. The pavement was slippery. There was only one set of auto tracks in the snow on the highway. There was not a set for eastbound traffic and another for westbound. The tracks were in the center of the highway for the most part, except where they rounded the curve at the scene of the accident—where they were on the north or right-hand side when going in a westerly direction. The highway was fairly level although it was banked upward to the south side around the curve. On the north side there was a shallow ditch abutting the shoulder.

Plaintiff-husband, referred to as plaintiff, was driving a Buick in a westerly direction in the tracks in the snow, travelling from 25 to 30 miles an hour. He had been travelling between four and five hours that day, mostly in snow, but did not have chains on his wheels, although he had them in the car. Defendant was driving a Chevrolet in an easterly direction in the tracks, travelling about 15 miles an hour. Plain-

tiff observed defendant's car when it was about 200 feet away. Defendant observed plaintiff's car when it was from 100 to 150 feet away; applied his brakes slowing down to between 5 and 7 miles an hour. As plaintiff's car approached that of defendant's, it speeded up. When the cars were from 30 to 40 feet apart, plaintiff's car was "coming" toward defendant's side of the highway. Defendant then applied his brakes with greater force. Plaintiff's car crossed the imaginary center and ran into defendant's car which "was practically stopped at the time of the impact." The impact bounced the two cars from 25 to 30 feet apart—plaintiff's back in the direction he had been coming, and defendant's back in the direction he had been coming and to the north side of the highway. After the collision "the snow was pretty well messed up in there." The cars "had thrown the snow around so you couldn't identify each track." The front end of the Buick was "badly smashed"; the chrome grill was scattered around in the snow. The Chevrolet "wasn't hurt near as bad"; the left-hand fender and part of the grillwork were damaged.

Plaintiffs' argument is largely based on the position of the cars after the accident. The Buick was on the right or north side of the highway, headed west "fairly close" to the shallow ditch. The Chevrolet was headed northeast. A Ranger, who appeared on the scene shortly after the accident, testified that the Chevrolet was at an angle with the front end pointing down toward the Buick, "but they were separated for some distance," and that it "might have been right on the center line. There's no way of telling exactly just where the center line was." He was asked, "Could you tell from the marks in the snow whether the impact moved the cars to the position where they were stopped?" He replied, "The snow was pretty well messed up in there. They had thrown the snow around so you couldn't identify each track." A traveller, who came on the scene shortly after the collision, testified it was rather difficult to observe where the sides of the road were; that one could easily stay in the center, "but you never knew how close you

were getting to the edge, because of the snow,"; that the Buick was on the north side, and that he "would judge" the Chevrolet was straddling the center, about three-quarters on the north side, sort of diagonal to the road; that his figures were an approximation.

[2-6] The evidence we have related as to how the accident happened is that of defendant and his wife who was in the front seat of the car with him. Plaintiff argues that their testimony is incredible and "fantastic." We find nothing improbable in the claim that the accident occurred on the south side of the snow-covered, slippery highway which sloped to the north, that the Buick came to a standstill on the north side, and that three-fourths of the Chevrolet was on that side. "Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence." *Austin v. Newton*, 46 Cal.App. 493, 498, 189 P. 471, 473. What was said in *Austin* is particularly applicable to a case in which the accident happened on a snow-covered, slippery highway. There is nothing in the testimony of defendant or his wife which could not have occurred on the highway in its condition as described in the uncontroverted evidence. "Testimony is not inherently improbable unless it appears that what has been related or described could not have occurred. *People v. Klinkenberg*, 90 Cal. App.2d 608, 627, 204 P.2d 47 [613]. "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true,

or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.' *People v. Huston*, 21 Cal.2d 690, 693, 134 P.2d 758, 759." *Trancoso v. Trancoso*, 96 Cal.App.2d 797, 798, 216 P.2d 172, 173.

[7-9] Unless we can say that, under undisputed physical facts, defendant was negligent and plaintiff was not contributively negligent, we must affirm the judgment. It is not sufficient that the story told by defendant and his wife may be improbable. It was for the jury and the trial judge to weigh and balance the probabilities. The trial judge denied plaintiffs' motion for a new trial. We cannot reverse on the ground that the implied findings of the jury are unsupported by the evidence, unless we can say that the facts impliedly found contravene recognized physical laws and that, therefore, the accident could not have happened in the manner described by defendant and his wife. That we cannot say.

[10,11] What plaintiffs ask, in effect, is that we try the case *de novo* on the record, reject all of the implied findings of the jury and substitute findings of our own. There is evidence which would have supported contrary findings. That the jury and the trial judge rejected that evidence does not impeach the soundness of their conclusions. Plaintiffs have failed to establish any greater grievance than they might in any case where the evidence would support a conclusion either way; but where the trier of fact has decided it to weigh more heavily for the other party. Such a choice between two permissible views of the evidence is not error.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

121 Cal.App.2d 45

SCHWEIZER et al. v. LOCAL JOINT EXECUTIVE BOARD OF SAN DIEGO, COMPRISING WAITERS & BARTENDERS UNION LOCAL NO. 500, et al.

Civ. 4600.

District Court of Appeal, Fourth District.
California.

Nov. 3, 1953.

Action to restrain interference with plaintiffs' business by picketing, or by the preventing the purchase and delivery of supplies, and for damages. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Barnard J., held that agreement to refuse to deliver goods to place of business being picketed did not constitute combination for purpose of restraint of trade.

Judgment reversed.

1. Labor Relations ⇨336

Picketing for an unlawful purpose is subject to injunctive relief.

2. Labor Relations ⇨261

Where employment contract between Joint Board of labor unions and employers permitted renewal unless written notification was given 30 days prior to termination, and Joint Board gave notice that agreement was about to expire and offered a new contract containing provision for payments into health and welfare fund, which employers refused to sign, the notice given was sufficient to terminate the contract.

3. Labor Relations ⇨332

Where proposed employment contract between Joint Board of labor unions and employers, which contained provision for benefit plan, was objectionable because it had not been approved by Wage Stabilization Board, and new temporary contract was tendered by Joint Board which omitted objectionable features, and employers refused to sign it, under such circumstances subsequent picketing of employers was not illegal.

4. Labor Relations ⇨301, 344

After striking, employees may engage in boycott, and in concerted withdrawal of social and business intercourse with employer, and may induce others to withdraw their business patronage from the employer, and such action is lawful if reasonably relevant to working conditions and the purposes of collective bargaining. Business and Professions Code, §§ 16700 et seq., 16720.

5. Labor Relations ⇨249

If primary purpose of agreement or combination is to interfere with trade in, and prevent sale of, certain products, the agreement or combination is unlawful, but if primary purpose is to see that union members shall not be required to violate picket lines, where reasonably relevant to purposes of collective bargaining, the agreement is not unlawful. Business and Professions Code, §§ 16700 et seq., 16720, 16703.

6. Labor Relations ⇨840**Monopolies** ⇨12(9)

Where drivers' union refused to deliver goods to cocktail lounge operators because of agreement between drivers' union and other unions not to deliver goods to business that was being picketed, such agreement did not constitute a "combination for purpose of restraint of trade" within act prohibiting unlawful combinations for purpose of restricting trade and commerce, and injunction to restrain union from preventing delivery and purchase of supplies was improperly granted. Business and Professions Code, §§ 16700 et seq., 16703, 16720.

See publication Words and Phrases, for other judicial constructions and definitions of "Combination for Purpose of Restraint of Trade".

Todd & Todd, San Francisco, Vincent Whelan, Thomas Whelan, Walter Wencke, San Diego, for appellant Local Joint Executive Board of San Diego.

Stevenson & Richmond, Los Angeles, for appellant Sales Drivers-Helpers and Dairy Employees Union Local No. 683.

Gray, Cary, Ames & Frye, James W. Archer, Ward W. Wardell, Jr., San Diego, for respondents.

BARNARD, Justice.

This is an action to restrain the defendants from interfering with plaintiffs' business by picketing, or by preventing the purchase and delivery of supplies, and for damages. The plaintiffs operated a cocktail lounge in San Diego. The defendants are certain unions herein referred to as "Joint Board", another union of drivers and warehousemen referred to as "Local No. 683", and two companies engaged in selling beer.

The plaintiffs had a contract with Joint Board covering the employment of union members between November 1, 1950, and November 1, 1951, with a provision that it should be renewed unless written notification was given by either party thirty days prior to its termination. On September 27, 1951, Joint Board gave the plaintiffs a notice which read: "This is to notify you as per Section 22, of the expiration of your present agreement. The (Joint Board) expect to negotiate a new contract with you by ———."

Joint Board offered a new contract containing a provision for payments into a health and welfare fund, which plaintiffs refused to sign. On March 14, 1952, a strike was called and plaintiffs' place of business was picketed. On March 27, 1952, the plaintiffs sought an injunction on the ground that the proposed contract was illegal in that it provided for payments into this benefit fund without prior approval by the federal Wage and Stabilization Board. A temporary restraining order was issued and on April 2, 1952, on stipulation of the parties, the restraining order was dismissed by an order reciting that it had been stipulated that the defendants would not picket for the failure to execute the contract forming the basis of the complaint; that a new contract without those objectionable features was being tendered; and that the controversy forming the basis of the complaint had become moot. Immediately thereafter, Joint Board tendered a new contract, limited to a period of 30 days, elim-

inating any payments into this fund, and also informed the plaintiffs that it expected to obtain the approval of the Wage Stabilization Board. The plaintiffs refused to sign this contract and picketing was resumed. After commencement of this second picketing, plaintiffs attempted to purchase beer from various wholesalers in San Diego but were unsuccessful because truck drivers and warehousemen employed by such wholesalers refused to handle beer for delivery to plaintiffs.

The present action was brought on April 14, 1952. The complaint alleged that there was no labor dispute; that Joint Board had demanded that plaintiffs sign a 30-day contract and agree to then sign another contract with terms unknown to plaintiffs; that this demand is unreasonable and the terms of the agreement offered are unlawful and contrary to public policy; that plaintiffs are willing to enter into a lawful agreement; that on April 7, 1952, the defendants entered into an illegal and unlawful monopoly for the purpose of restricting trade and commerce, in violation of section 16720 of the Business and Professions Code (hereinafter called the Cartwright Act), whereby defendants agreed to sell merchandise only to those who are members of the monopoly and to prevent all others from purchasing merchandise for resale to the public; that pursuant to said unlawful trust agreement the defendant distributors refused to sell the plaintiffs any merchandise; and that the plaintiffs have been damaged in various amounts.

So far as material here, the court found that the notice served by Joint Board on September 27, 1951, indicated an intention to negotiate a new contract; that no such negotiations were had except as thereafter set forth; that the original contract of November 1, 1950, remained in full force; that in January, 1952, Joint Board entered into a contract with certain persons who were to act as trustees to hold a certain fund for the purpose of paying insurance benefits to employees of employers who might agree to pay 50¢ per day per employee into said fund; that prior to March 14, 1952, these trustees and Joint Board and certain employers filed a petition with

the Wage Stabilization Board for approval of the benefits to be thus paid according to a plan submitted, but this plan was not approved until May 9, 1952; that the plaintiffs refused to sign a contract including a provision for the payment of 50¢ per day per employee into this fund; that this was followed by picketing and by a temporary restraining order, which order was dismissed on the representation that a contract was being presented which eliminated the provision for these payments; that such a contract was offered which was limited to a period of 30 days; that the plaintiffs refused to sign this limited contract and picketing was resumed; that Joint Board has not since offered any contract other than one substantially the same as that offered prior to March 27, and which would require the plaintiffs to perform acts contrary to the rulings of the Wage Stabilization Board; that the purpose of the picketing was to induce plaintiffs to accept such a contract by cutting off their supplies, the picketing being during the daytime, but not at night or on Sundays or holidays when plaintiffs' business is the heaviest; that picketing was maintained as a part of the combination thereafter described and not for the purpose of informing the public of a labor dispute; that Local No. 683 and its members have for years been associated with Joint Board and its unions in a central labor council, with an understanding that the members of Local No. 683 will refuse to deliver goods to a place of business being picketed by the other unions; that a violation of this understanding is punished by suspension, expulsion or fines; that Local No. 683 has contracts with the defendant distributors and other firms selling beer at wholesale; that this contract provides that its members shall not be discharged or discriminated against for refusing to pass a duly sanctioned picket line; that Local No. 683 informed all of its members that this picket line was recognized as a sanctioned picket line; that on or about April 7, 1952, the plaintiffs appeared at the place of business of defendant distributing companies and ordered beer offering to take delivery there; that the warehouse employees, whose duty it was to

handle the beer, refused to fill said orders because of this picket line and in order to cooperate in preventing plaintiffs from obtaining supplies; that the defendant distributors made no effort to require their employees to deliver such beer, and thereby refused to sell beer to the plaintiffs; that this refusal to sell was the result of a tacit understanding that no beer would be sold to persons whose business was being picketed by picket lines recognized by Local No. 683, and the distributor defendants are a part of this combination to create and carry out restrictions in the sale of beer, and restrictions in trade and commerce; and that by reason of these acts the plaintiffs have suffered certain damage.

As conclusions of law, it was found that the contract demanded by Joint Board is illegal and in violation of the rules of the Wage Stabilization Board, and would require the plaintiffs to perform illegal acts; that the acts of the Joint Board and the coercive measures employed are an unlawful interference with plaintiffs' business and a violation of their property rights; that the conduct of the defendants constitutes a combination to create and carry out restrictions in trade and commerce, and constitutes a trust within the meaning of Chap. 2, Pt. 2, of Div. 7 of the Business and Professions Code; that the plaintiffs are entitled to certain named damages; and that the plaintiffs are entitled to a permanent injunction enjoining the defendants from such picketing, from refusing to sell or deliver beer to the plaintiffs, and from in any manner, directly or indirectly, preventing distributors from selling or delivering supplies to the plaintiffs. Judgment was entered accordingly, and the defendant labor unions have appealed.

[1] The record and briefs are voluminous and many points are raised, including attacks on the jurisdiction of the state court; the sufficiency of the evidence to sustain the findings; the sufficiency of the findings to support the conclusions of law; the failure to find upon important issues; and the failure to admit certain evidence. The parties agree that picketing for an unlawful purpose is subject to injunctive

relief. *Park & Tilford Import Corp. v. International Brotherhood of Teamsters*, 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426; *Seven Up Bottling Co. v. Grocery Drivers Union*, 40 Cal.2d 368, 254 P.2d 544. The appellants contend that no unlawful purpose appears in connection with the picketing here in question; that no restraint of trade and no violation of the Cartwright Act appears; that they were guilty of no conspiracy, and the contract they sought to obtain through this picketing was not illegal; that the members of Local No. 683 have the right to refuse to deliver goods through a picket line or to work on goods destined for the respondents; and that there was no existing contract between the parties when the picketing commenced. The respondents contend that this picketing was for an illegal purpose because the 1950 contract was not terminated by proper notice and was still in force, because the purpose of the picketing was to secure an illegal contract, and because the acts of the appellants constituted a violation of the Cartwright Act.

[2] The controlling questions raised relate to whether or not an unlawful purpose, or an unlawful combination in restraint of trade, here appears. We are not impressed with the argument that the notice given was not sufficient to terminate the 1950 contract, and the court's finding that this contract was still in force is not supported by the evidence. The notice referred to the clause of the contract providing for the giving of a 30-day notice of termination, and gave notice in accordance with that clause of the expiration of the agreement. The sufficiency of the notice is not affected by the fact that it stated that it was expected to negotiate a new contract, and an attempt was made to that end.

[3] It cannot be held that an illegal picketing appears because specific permission covering the proposed benefit plan had not been obtained from the Wage Stabilization Board at the time the picketing commenced, or that it appears that the purpose of the picketing was to secure an illegal contract calling for benefit payments from the employers without the approval of

the Wage Stabilization Board. It is argued in this connection that no such approval was obtained until May 9, 1952, and that when obtained this approval did not specifically cover the respondents. Evidence as to the terms of the approval given as of that date were not admitted in evidence and, although tendered at the oral argument and objected to, that evidence is not part of the record here. The contract actually tendered by the appellants, although a temporary one, eliminated all reference to these benefit payments and the evidence clearly indicates that there was no intention to demand a contract including that element until such time as proper approval was obtained from the Wage Stabilization Board. There is no evidence that such approval could not have been obtained in due course, or that the offered contract would not have been extended until that was done. The evidence clearly indicates that the respondents refused to sign the offered contract not because of the lack of any proper approval but because they were unwilling to pay the benefit payments in question.

[4] It has long been held in this state that after striking employees may engage in a boycott, including the right to a concerted withdrawal of social and business intercourse with the employer and the right to induce others to withdraw their business patronage from the employer, and that such action is lawful if reasonably relevant to working conditions and the purposes of collective bargaining. *Parkinson v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 L.R.A..N.S., 550; *Lisse v. Local Union No. 31*, 2 Cal.2d 312, 41 P.2d 314; *McKay v. Retail Automobile S. L. Union No. 1067*, 16 Cal.2d 311, 106 P.2d 373; *Lund v. Auto Mechanics' Union No. 1414*, 16 Cal.2d 374, 106 P.2d 408; *C. S. Smith Metropolitan Market Co. v. Lyons*, 16 Cal.2d 389, 106 P.2d 414; *Fortenbury v. Superior Court*, 16 Cal.2d 405, 106 P.2d 411; *In re Lyons*, 27 Cal.App.2d 293, 81 P.2d 190; *In re Blaney*, 30 Cal.2d 643, 184 P.2d 892. In the latter case, statutes declaring a secondary boycott to be unlawful, apparently adopted for the purpose of meeting conditions permitted under

prior court decisions, was declared to be unconstitutional as being too broad in scope.

The respondents contend that the grounds for decision in the Blaney case leave little vitality in the supposed public policy indicated by the other cases above cited. They argue that the Cartwright Act makes the actions here in question unlawful in this state; that this act contains no express exception in favor of such union conduct as appears here; and that no supposed public policy should be relied on to create such an exception. They rely mainly on *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834. That case involved picketing in violation of the Restraint of Trade statute of the state of Missouri. The respondents contend that the Cartwright Act accomplishes the same purpose in this state, that the actions of the appellants constitute a combination in restraint of trade as defined in the Cartwright Act, and that these acts, being illegal, were properly restrained. It is argued that the understanding between the appellant unions and the notification given of the existence of this picket line constituted a combination and conspiracy which depended upon the cooperation of the warehousemen; that this comes within the terms of the Cartwright Act; that this is an attempt to restrain trade or commerce in a commodity; and that prior decisions in this state are not applicable because the evidence here shows an attempt to gain control over the supply of a product and to refuse to sell it to anyone who has displeased the unions.

The gist of the complaint in this action is that the defendants entered into a combination for the purpose of restricting trade or commerce, in violation of the Cartwright Act. The only agreement or combination thus referred to consisted in the understanding between the unions to the effect that their members would not cross each other's picket lines, and would not assist in the delivery of products to an employer whose place of business was subjected to a picket line recognized by another union, and the acquiescence of the distributors in this agreement. As long

ago as the case of *Parkinson v. Building Trades Council*, supra, it was pointed out that a combination for that purpose was not unlawful when its object was to further lawful purposes affecting labor conditions, such rules having been adopted long before any controversy arose and the action complained of being merely the putting into effect of those rules when the controversy arose and brought the employer within the general class necessarily affected by the enforcement of the rules.

[5] The main question on this appeal is whether the actions of the defendants, resulting in the refusal to handle goods in connection with delivering them to the respondents, constitute a trust or combination for the purpose of creating or carrying out restrictions in trade or commerce, within the meaning of the Cartwright Act. It is true; as pointed out in *Kold Kist, Inc., v. Amalgamated Meat Cutters*, 99 Cal.App.2d 191, 221 P.2d 724, that combinations for the purpose of controlling prices and creating a monopoly are not the only ones forbidden by the Cartwright Act since that act also forbids combinations for the purpose of carrying out restrictions in trade or commerce, limiting or reducing the production of any commodity or preventing competition in the sale or purchase of any commodity. It does not follow, however, that any agreement or combination which has the effect of interfering to some extent with the purchase or sale of merchandise, is covered by the act and unlawful by reason thereof. As we read that case, it supports the conclusion that the real test in a particular case is the primary purpose of the agreement or combination in question, and that if this primary purpose is to interfere with the trade in, and prevent the sale of, certain products the agreement or combination is unlawful. It seems well established, however, that if the primary purpose of the agreement or combination is to see that union members shall not be required to violate picket lines, where reasonably relevant to the purposes of collective bargaining, the agreement is not unlawful.

The Cartwright Act, as a whole, seems to have been designed to cover trusts or

combinations in the ordinary sense, in order to prevent certain price fixing and other restrictions on trade in connection with the production and sale of commodities, and particularly as related to persons manufacturing or selling such goods. One section of the act, Section 16703 of the Business and Professions Code, provides that labor is not a commodity within the meaning of the act. Reasonably interpreted, this must be held to have been intended to except from the operation of the act combination of laborers for the purpose of furthering their interests by collective bargaining, when not otherwise unlawful.

[6] In *C. S. Smith Metropolitan Market Co. v. Lyons*, 16 Cal.2d 389, 106 P.2d 414, where the picketing caused other firms and their employees to refrain from selling or delivering merchandise to the plaintiffs, the Cartwright Act was mentioned and it was pointed out that that act interfered to some extent with free competition in business; that interference with business through picketing is also sanctioned by law; and that the test to be applied in such a case is whether the workmen are demanding something which is reasonably related to employment and collective bargaining. In the *Blaney* case [30 Cal.2d 643, 184 P.2d 896], where a statute expressly making secondary boycotts unlawful was involved, the court said: "It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly." In *Apex Hosiery Company v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 988, 84 L.Ed. 1311, where a restraint of trade appeared, the court said: "But the Sherman Act, [15 U.S.C.A. §§ 1-7, 15 note] admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation." We think the same must be said of the Cartwright Act. This statute has been in force for many years and it may not be assumed that, had it not been overlooked, the many decisions in this state with respect to the lawfulness of such acts as here appear would have been

to a contrary effect. We conclude that no violation of the Cartwright Act appears, and that the record does not support the trial court's conclusion that the acts of the defendants constituted a combination in restraint of trade within the meaning of that act.

Under what we regard as the controlling effect of the decisions of the Supreme Court above cited, and others, we think no unlawful activity appears which would justify or support the injunction here granted. Numerous other points raised need not be considered.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; EDMONDS and SPENCE, JJ., dissenting.



PARR-RICHMOND INDUSTRIAL CORP.
v. BOYD et al. *
Civ. 15414, 15415.

District Court of Appeal, First District,
Division 2, California.

Nov. 3, 1953.

Hearing Granted Dec. 30, 1953.

Consolidated actions by taxpayer to recover taxes paid under protest. The Superior Court, County of Contra Costa, Thomas F. Keating, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Goodell, J., held that where deeds were placed in escrow until government could convey merchantable title, grantee did not acquire title until condition of merchantable title had been complied with, and tax against grantee as fee owner was illegal.

Judgments affirmed.

I. Escrows ⇐9

Where a deed is placed in hands of third person as an escrow with agreement between grantor and grantee that it shall not be delivered to grantee until he has complied with certain conditions, grantee

* Subsequent opinion 272 P.2d 16.

does not acquire title to land nor is he entitled to delivery of deed until he has strictly complied with conditions.

2. Taxation ☞80

Where deeds were placed in escrow until government could convey merchantable title, and government consented to grantee's use of the property and agreed to convey title as of September 23, 1947, but subsequently deeds were delivered which recited that they became effective June 1, 1949 recital in deeds superseded earlier provision that title would be conveyed as of September 23, 1947, and tax imposed on grantee as fee owner instead of on grantee's possessory interest during tax years deeds were in escrow was illegal. Revenue and Taxation Code, §§ 1607, 5136-5143.

3. Taxation ☞80

Where deeds were placed in escrow for 16 months while government acquired merchantable title, purchaser occupying property under gratuitous right to possession was not liable for taxes as fee owner notwithstanding that clouds on title were interests of no value, and taxing authorities did not assess them for taxes. Revenue and Taxation Code, §§ 5136-5143.

4. Taxation ☞493(7)

Where taxpayer alleged in his complaint that taxing authorities assessed him as though he had fee title when instead he had only revocable possessory interest granted by government, the complaint stated cause of action for judicial review of determination of value made by Boards of Equalization. Revenue and Taxation Code, § 1607.

5. Taxation ☞543(8)

Where taxing authorities impose illegal tax, recovery should be limited to difference between tax paid and that which properly should have been paid. Revenue and Taxation Code, §§ 5136-5143.

6. Taxation ☞543(8)

Where taxing authorities assessed taxpayer as though he had fee title to property, when in fact he was in possession under gratuitous possessory interest granted by government, court properly computed tax on possessory interest formula.

Thomas M. Carlson, City Atty. of City of Richmond, Frederick Bold, Jr., Sp. Asst. to City Atty., Richmond, for appellants Forrest J. Simoni, City Tax Assessor and City Tax Collector of City of Richmond and City of Richmond.

Francis W. Collins, Dist. Atty. of Contra Costa County, Charles L. Hemmings, Dep. Dist. Atty., Martinez, for appellants S. S. Boyd, County Tax Collector of Contra Costa County, Justin A. Randall, County Assessor of Contra Costa County and Contra Costa County.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

GOODELL, Justice.

Respondent commenced two actions under sections 5136-5143 Revenue and Taxation Code to recover State and County and City taxes paid under protest. The property is located in the City of Richmond and the city's tax proceedings adopted the pattern employed by the County of Contra Costa, hence the city and its officers were joined as defendants with the county and its officers. In the first action, which embraced the 1948-1949 taxes, the judgment was against the county for \$27,265.28 and interest, and against the city for \$12,312.72 and interest. In the second, which embraced the 1949-1950 taxes, the judgment was against the county for \$31,227.93 and interest, and against the city for \$11,339.85 and interest. The cases were consolidated for trial and it was stipulated that evidence would be produced only in the first case and that the judgment therein would govern the second. On appeal the cases are consolidated.

The taxes were levied and assessed by the county and the city on the basis that title to the real property was vested in the taxpayer on the first Monday in March of both years. The taxpayer's position throughout has been that all it had on the first Monday in March of both years was, as the court found, "a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession"; that the assessments should have been made only against such possessory right, and not as if it held the whole bene-

ficial interest. Such was the ground of the protests on which this litigation was based.

The property in question is described as parcels 2 and 5 of the Richmond Shipyards, consisting of about 115 acres improved with various buildings, wharves, shipways and other structures, which had been a Government shipyard during World War II.

In 1947 it was under the control of the War Assets Administration as surplus property and on August 15, 1947 that agency listed it (with other property) for sale and invited bids. The invitation stated that title would be conveyed by quitclaim deed without warranty, express or implied.

A conditional bid of \$320,000 was submitted on behalf of respondent for parcel 2, and \$125,000 for parcel 5. One condition was that both parcels should be treated as a unit. Another condition was that: "This bid is also subject to the ability of bidder to procure a policy of title insurance in its name or in the name of its nominees as referred to in Rider A, as of the date of the completion of this transaction, in the event of acceptance hereof, showing good and merchantable title to said property free and clear of any lien or encumbrance which would substantially affect its value." Before bidding Parr had learned from a preliminary title report that the title was not then merchantable. The invitation also contained the restriction that the successful bidder could not make any sale or lease of the property, or any part thereof, for three years after acquisition without the Government's consent. Respondent's bid contained the condition that this restriction would have to be waived or removed.

The bid was rejected, not because of these conditions attached to the offer, but solely because the prices bid were not acceptable. The Government made a counter proposal of higher figures, and after negotiations the parties agreed on \$500,000 for both parcels. On September 23, 1947 the original bid, *amended only as to price*, was approved by the Government.

On January 21, 1948 a formal acceptance was made by the Government in a communication to Parr termed a "letter of intent"

which *inter alia* read as follows: "Consent is hereby granted to the Parr-Richmond Industrial Corporation and/or the Parr-Richmond Terminal Company, as the case may be, to enter upon and use the land, buildings, improvements, and personal property, the title to which is being conveyed to you as of 12:01 a.m. September 23, 1947,¹ for its own account, and its action in so doing shall constitute concurrence in and acceptance of the arrangements, terms, and conditions of this Letter of Intent."

The letter of intent contained also the following provision respecting the escrowing of the down payment: "Your company, in accepting this Letter of Intent, agrees, prior to entering into possession, to deposit with the * * * Title Company * * * the agreed upon initial payment of * * * \$122,412.42 * * * such payment to be in the form of a certified or cashier's check made payable to the Treasurer of the United States."

On January 30, 1948 Parr delivered to the title company a cashier's check for \$122,412.42 accompanied by a letter of instructions reading in part as follows: "However, whichever corporation does take title, you are authorized to deliver to the War Assets Administration the sum of * * * \$122,412.42 * * * upon their depositing with you a Quitclaim Deed duly executed by said War Assets Administration, which will vest merchantable title in favor of either Parr-Richmond Industrial Corporation or Parr-Richmond Terminal Company as such determination shall be made. * * Upon receipt of this letter and the check enclosed herewith * * * will you please acknowledge receipt of same upon the copy enclosed herewith so that we may in turn hand it to the War Assets Administration as evidence of the fact that this money has been deposited with you in the above numbered escrows."

In January, 1948 Parr took possession of both parcels under the provision in the letter of intent (quoted above) respecting possession, and on the first Monday in March of both tax years held possession thereunder. It was not until June 1, 1949 that

1. See footnote *infra*.

title passed, at which time two quitclaim deeds bearing that date were executed, acknowledged and delivered by the United States of America to respondent as grantee—one for each parcel. Each deed concluded with the statement "This Quitclaim Deed, executed this 1st day of June, 1949, shall be considered effective as of the day and year first hereinabove written" which was June 1, 1949.² Contemporaneously therewith two deeds of trust dated and acknowledged on June 1, 1949—one for each parcel—securing the balance of the purchase price (after the down payment) were delivered by the title company to the Government. Thus the down payment was in escrow from January 30, 1948 until June 1, 1949—sixteen months.

This brings us to the findings. When bids were invited, each bidder was required to specify the purposes for which he intended to use the property. The Parr bid stated that its purpose was to develop the property as an industrial area; to bring in new industries by long-term leases and by sales. These avowals, plus Parr's insistence on the removal of the three-year restriction against sales and leases, make it perfectly clear that a merchantable title was the *sine qua non* of Parr's intended purchase. In that connection the court found that "plaintiff's bid contemplated the long-term lease or sale of part or all of said realty to industrial firms desiring to locate in the City of Richmond, and * * * that purpose could not be achieved unless and until plaintiff could obtain a merchantable title to said realty; rider D of plaintiff's bid recited the express condition of merchantable title, and went to the essence of plaintiff's conditional bid and the conditional agreement subsequently entered into between the U.S.A. and plaintiff." (Emphasis added.)

The Court found also that under the letter of intent Parr agreed to purchase the property if, as and when the Government could convey a good and merchantable title, and that the Government agreed on its part

to convey such title if, as and when it could do so; further that during all of 1948 the sale was wholly executory "and at all of said times there were clouds, encumbrances and adverse claims upon the title to said realty which adversely affected said title to a substantial degree, and which rendered said title unmerchantable".

The court found also that on the first Monday in March, 1948 there was uncertainty as to whether the Government would be able to convey a good and merchantable title and if so, when and that on that date Parr's only interest, right or title to the property was "a qualified and contingent possessory interest in the form of a gratuitous and revocable right to possession", the reasonable duration of which was found to be a period of one year.

The court found that "As of the first Monday of March, 1948, for the tax year 1948-49, defendant County * * * assessed all of said realty against plaintiff in the same manner and with the same effect as though plaintiff were the owner in fee of said realty with full beneficial ownership and use thereof. Said realty was * * * assessed * * * [at] \$229,090.00 for real estate, and \$335,000.00 for improvements, together with an assessment of \$25,500 for certain personal property then situated on said realty; said assessment * * * was * * * charged to plaintiff upon the assessment roll of the County * * * as an assessment against real estate, improvements, and personal property, and not as an assessment against plaintiff's said possessory interest. In said assessment defendant County * * * did not segregate the plaintiff's qualified and contingent possessory interest in said realty from the fee ownership of the United States, and did not assess said possessory interest to plaintiff, but instead erroneously assessed the entire fee ownership of said realty to plaintiff; a proper segregation of plaintiff's qualified and contingent possessory interest in said realty and a proper assessment of said in-

2. This is noted because of the recital in the letter of intent (quoted above) that "the title to which is being conveyed to you as of 12:01 a. m. September 23, 1947".

Title was conveyed on June 1, 1949, as of June 1, 1949, according to the language chosen by the Government in the conveyances which it prepared.

terest * * * would have resulted in an assessed value * * * of \$71,581.00 * * *."

The court found and concluded that the assessments when made by both county and city were illegal and void for the reason that the United States was the owner in fee of the property taxed against Parr and that Parr's possessory interest had not been assessed at all.

The trial court concluded that under the terms of the conditional agreement "plaintiff was not obligated to purchase said realty unless and until said condition were met, and unless said condition were met within a reasonable time plaintiff was not obligated to purchase said realty and the U.S.A. was not obligated to sell said realty in any event, and said conditional agreement would terminate; said conditional agreement did not effect an equitable conversion as to said realty on the first Monday in March, 1948, or at any time during the tax year 1948-49, and at no time prior to or during said tax year was plaintiff the legal or equitable owner of said realty by virtue of said conditional agreement or otherwise." (Emphasis added.)

The court deducted the taxes which it found Parr should have paid on its possessory interest from the amount paid under protest and entered judgment for the difference against the respective defendants.

Appellants contend that the equitable title of a purchaser of land from the United States under an executory contract of sale is taxable as real property, and not as a possessory interest. Respondent concedes this in the following statement: "Did plaintiff have the equitable title, or beneficial ownership of the property on March 1, 1948? *If it did, the tax is valid.* If it did not, the tax is void. That is the principal issue of the case. The issue is not met by defendants' argument that an equitable title may be taxed as realty. *Certainly it may.* Nor is it met by defendants' statement, 'There is no dispute that on tax day plaintiff had a vendee's equitable title under an executory contract of sale.' That is the dispute!" (Emphasis added.)

Appellants' whole contention that equitable title vested as of September 23, 1947, or at some other time prior to June 1, 1949, is completely answered by the creation of the escrow.

"That there must be a binding contract based on a valid consideration to support an escrow admits of no debate. *Thomas v. Birch*, 178 Cal. 483, 489, 173 P. 1102; *Holland v. McCarthy*, 173 Cal. 597, 602, 160 P. 1069; 10 Cal.Jur. 581." *Los Angeles High School District v. Quinn*, 195 Cal. 377, 383, 234 P. 313, 315. That contract consisted of Parr's conditional bid and the Government's letter of intent. However, the letter of intent contained the escrow provisions already quoted which, of course, became part and parcel of the contract.

[1] "Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land, nor is he entitled to a delivery of the deed until he has strictly complied with the conditions [citation]." *Los Angeles High School District v. Quinn*, supra, 195 Cal. 377, 383, 234 P. 313, 315. The *Quinn* case is followed in *Promis v. Duke*, 208 Cal. 420, 425, 281 P. 613 and *Brown v. Wilson*, 89 Cal.App. 764, 766, 265 P. 351. In *Bullock v. McKeon*, 104 Cal.App. 72, 79-80, 285 P. 392, 396, it is said: "The terms of an escrow instruction are to be strictly construed, and until the other party has complied with such terms as so construed, he can gain no rights under them. *Dyson v. Bradshaw*, 23 Cal. 528; *Los Angeles High School Dist. v. Quinn*, 195 Cal. 377, 234 P. 313; *McCarthy & Meyer v. Bank of Italy*, 68 Cal.App. 166, 228 P. 724."

[2] The question of the vesting of equitable title was resolved by the holding that "at no time prior to or during said tax year was plaintiff the legal or equitable owner * * *." That conclusion was inevitable by reason of the following facts (a) Parr knew before it bid that a variety of matters—including uncompleted proceedings in eminent domain—rendered the title

unmerchantable; (b) the Government accepted the conditional bid which called for a merchantable title; (c) the escrow provisions in the letter of intent were tacit admissions by the Government that it needed time to make the title good, and (d) the sixteen-month delay accentuated this. If any possible doubt remained it is definitely settled by the recital in both quitclaim deeds that they became effective as of their date, which was June 1, 1949. Any provision found in the earlier writings to the effect that title would be conveyed as of 12:01 a. m. September 23, 1947 was entirely superseded and nullified by the deeds themselves which made it perfectly clear that title vested on June 1, 1949, and not before.

[3] Appellants' argument that "Whatever clouds may have been on the title were interests of no value none of which were assessed for taxes", falls of its own weight, not only because it is wholly unsupported by any reference to the record, but because of the sixteen-month duration of the escrow.

Appellants rely chiefly on *S.R.A., Inc., v. State of Minnesota*, 327 U.S. 558, 66 S.Ct. 749, 754, 90 L.Ed. 851, but the facts found by the trial court, herein and already fully discussed, differentiate the two cases. There is one point common to both cases which, however, is not material, i. e., the property in both instances was surplus real estate the legal title to which was vested in the United States, but as the court there points out such contracts "are construed as contracts between private parties." The opening sentence of the opinion states the sole question presented in the *S.R.A.* case as follows: "A question as to the power of the State of Minnesota to tax realty within the boundaries of that state, when the legal title remains in the United States is presented by this writ of certiorari." The two concurring opinions also emphasize that this was the only question in the case. There are several points of difference: (1st) There the contract was the normal vendor-vendee contract where legal title was retained as security for the balance of the purchase price and the court said: "In substance it [the vendor] is in the position of a mortgagee."

Here the vendor-vendee contract, as modified in writing by the escrow instructions, provided for the passage of title only if and when the vendor could convey a merchantable title, pending which (uncertain) event the down payment itself was to be, and was, held up in escrow. Instead of the vendor retaining title as security, deeds were to pass and notes, secured by deeds of trust, were to be, and were, given for the balance of the purchase price. (2nd) The whole sale hinged on a merchantable title, a matter not at all involved in the *S.R.A.* case, where, as the court said, "All obligations due under the contract had been met." (3rd) In the *S.R.A.* case the buyer was "in possession * * * under a contract of sale with uncompleted conditions for execution and delivery of the muniments of title" when the purchase price was paid in full, while here the buyer occupied the property under what the court found to be "a gratuitous and revocable right to possession" given by the letter of intent, to carry over during the interval while the title was being straightened out so that a good and merchantable title could be conveyed, at which time the muniments of title were to be delivered out of escrow and deeds of trust given back. (4th) During that interval Parr did not occupy the status of a normal vendee as in the *S.R.A.* case where the vendee had made the down payment. The fact that Parr was not in the position of the conventional vendee during the sixteen-month escrow period but was waiting to see if it was to get *any* title, alone and by itself distinguishes this from the ordinary vendor-vendee cases where, as respondent concedes, the vendee holding equitable title is taxable as if vested with full legal title.

The doctrine of equitable conversion "is a mere fiction resting upon the principle that equity regards things which are directed to be done as having actually been performed where nothing has intervened which ought to prevent such a performance." 19 Am.Jur. p. 2, § 2. "The purpose of the doctrine of equitable conversion is to give effect to the intention of the * * contracting parties, and it will not be given

an effect contrary to such intention". Id. p. 4, § 4. Some of the California cases so holding are *In re Estate of Pforr*, 144 Cal. 121, 128, 77 P. 825; *In re Estate of Gracey*, 200 Cal. 482, 488-489, 253 P. 921 and *McCaughna v. Bilhorn*, 10 Cal. App.2d 674, 678-679, 52 P.2d 1025. The findings in this case carry the implication that here there was no such intention, which conclusion, as stated above, inevitably followed from the escrow.

The question of equitable conversion is the principal point on this appeal. Appellants, however, contend also that "The complaint does not state a cause of action for judicial review of the determination of value made by the Boards of Equalization." Section 1607, Rev. & Tax Code, provides that "A reduction in an assessment on the local roll shall not be made unless the party affected * * * makes and files with the county board a verified, written application for it, showing the facts claimed to require the reduction."

[4] Plaintiff alleged that in July of each of the two tax years it filed "a verified petition for cancellation of erroneous and illegal assessments and for reduction in assessments" with the Board of Supervisors sitting as a Board of Equalization, both of which petitions were denied. Copies annexed to the complaints show clearly that the ground thereof was not that the valuations by the assessor of the real estate at \$229,090 and the improvements at \$335,000 were over-valuations calling for "A reduction in an assessment on the local roll * * *", § 1607, *supra*, but that the ground was that the assessments were illegal *in toto* because they treated the title as vested in Parr whereas it remained vested in the United States, while Parr had nothing but a revocable possessory interest which was not assessed. Respondent has stipulated that these allegations "are in no way essential to plaintiff's cause of action, and * * * may be stricken as surplusage." That being so, there is no reason to discuss this point at any length. The complaint in each action states a cause of action based on an illegal tax because it was not levied and assessed against Parr's mere possessory interest. See *Unit-*

ed States v. Allegheny County, 322 U.S. 174, 187, 64 S.Ct. 908, 915, 88 L.Ed. 1209; *Gottstein v. Adams*, 202 Cal. 581, 262 P. 314; *City of Los Angeles v. Board of Supervisors*, 108 Cal.App. 655, 292 P. 539. We close this part of the discussion with the following language from *Associated Oil Co. v. County of Orange*, 4 Cal.App.2d 5, 9, 40 P.2d 887, 889:

"While in one sense it is true that almost any mistake which results in an excessive assessment amounts to an overvaluation of the property of a taxpayer, we think there is a real and distinct difference between those cases in which it may properly be said that the error is one of overvaluation and those cases in which the overvaluation is a mere incidental result of an erroneous assessment of property which should not have been assessed. This distinction was recognized in *Brenner v. [City of] Los Angeles*, 160 Cal. 72, 116 P. 397, 399, in which case the court said: 'But we are of the opinion that, in so far as *Henne v. County of Los Angeles* (129 Cal. 297, 61 P. 1081), places in the same category the mere overvaluation of property in an assessment thereof, and the inclusion in such an assessment of property not taxable at all, that case should be overruled.'"

Appellants' third and last contention is that "The formula for determining the assessment approved in the case of *Kaiser Co. v. Reid* is not applicable to the assessment of plaintiff's equitable title to the property." This very statement shows that it is based on the equitable title theory which, as already appears, we are unable to follow.

[5] Respondent has conceded throughout this litigation that its possessory interest was taxable and therefore that it would "be inequitable for plaintiff to seek to recover taxes which in equity it should pay." The rule is that the recovery in such cases should be limited to the difference between the tax paid and that which properly should have been paid and that rule was followed in this case.

[6] In arriving at the tax on Parr's possessory interest the court followed the

formula used in *Kaiser Co. v. Reid*, 30 Cal.2d 610, 184 P.2d 879. The tax, computed according to that formula was then deducted from the amount of tax claimed by the appellants and the judgments herein were entered for the difference. Appellants do not attack the accuracy of the computations, but simply stand on their basic contention that the taxes claimed, and paid under protest, based on their equitable title theory, were right and Parr's contention wrong. Parr's position was made perfectly clear in its brief and appellants have not seen fit to answer it (or any of the other contentions of respondent) since they filed no closing brief. We find no merit in appellants' third contention.

The judgments are affirmed.

NOURSE, P. J., and DOOLING, J.,
concur.



121 Cal.App.2d 102

MAXFIELD v. BURTT et al.

Civ. 8225.

District Court of Appeal, Third District,
California.

Nov. 4, 1953.

Hearing Denied Dec. 30, 1953.

Action for specific performance of an option agreement giving plaintiff the right to purchase all outstanding shares of defendant mining corporation's capital stock and for damages because of the failure of defendant owners of such shares to convey them to plaintiff. From a judgment of the Superior Court, Placer County, W. T. Belieu, J., for defendants, plaintiff appealed. The District Court of Appeal, Schottky, J., held that a written notice to plaintiff of cancellation of the option because of plaintiff's specified defaults in payment of monthly installments of the purchase price and taxes and premiums for insurance on the corporation's property, with a demand that such defaults be cured

by a date over 30 days after the date of such notice, was proper notice of such defaults in conformity to requirements of option agreement, though not signed by original optionors but by transferees of the stock, and effected a forfeiture of the option, though the stock was not tendered or offered to be delivered to plaintiff if he paid the full purchase price, where he did nothing toward such end after receipt of the notice.

Judgment affirmed.

1. Appeal and Error ⇐931(1)

On appeal, conflicting evidence must be construed in light most favorable to respondents and every inference and presumption reasonably deducible in their favor from evidence should be resolved in support of judgment appealed from.

2. Corporations ⇐118

Corporation stockholders, executing agreement giving another option to purchase all of corporation's stock did not waive optionee's punctual payments of monthly purchase money installments by demanding payment of delinquent installments or by failing to declare forfeiture of option for defaults in such payments.

3. Corporations ⇐117

Where option agreement for purchase of all of corporation's capital stock provided that no waiver by stockholders of any breach of agreement by optionee or cause for forfeiture of option should be deemed waiver of subsequent breaches or causes for forfeiture, stockholders were not required to notify optionee, after default in payment of monthly purchase money installment, that strict performance of agreement by optionee would be required in future, in order to forfeit option for subsequent defaults.

4. Corporations ⇐117

Written notice to optionee of cancellation of option to purchase mining corporation's stock because of optionee's specified defaults in payments of purchase money installments and taxes and premiums for insurance on corporation's property, with demand that such defaults be cured on or before a date over 30 days after date of

such notice, in conformity with requirements of option agreement, was proper and effectual, though not signed by original optionors, but by their transferees of stock.

5. Corporations ⇨117

A written notice to optionee of cancellation of option to purchase mining corporation's stock for specified defaults in payments of monthly purchase money installments, taxes and insurance premiums, and demand that such defaults be cured on or before a date over 30 days after date of such notice, in conformity with requirements of option agreement, effected forfeiture of option, though stock was not tendered or offered to be delivered to optionee if he paid full purchase price, where he did nothing toward such end after receipt of notice.

6. Judgment ⇨739

A judgment is not an adjudication of matters which were not and could not properly be relied on and determined in action wherein judgment was rendered, but is conclusive of all matters clearly adjudicated by it, where requisite jurisdiction exists.

7. Judgment ⇨634

In determining validity of plea of res judicata, pertinent questions are whether issue decided in prior adjudication was identical with that presented in instant action, whether there was prior final judgment on merits, and whether party against whom plea is asserted was a party or in privity with a party to prior adjudication.

8. Specific Performance ⇨3

Specific performance of contract is allowed only in interest of justice, and before equity principles may be appealed to for such relief, plaintiff must have just and equitable cause of action.

Zeutzus & Steffes, Los Angeles, for appellant.

Carl E. Day, San Francisco, Victor A. Chargin, San Jose, for respondents.

SCHOTTKY, Justice.

Plaintiff brought this action to specifically enforce an option agreement to purchase

all of the outstanding shares of stock of the defendant Baker Divide Mining Company for the sum of \$25,000 and for damages resulting to him because of the failure of the defendant owners of said stock to convey same to him as provided in said agreement and the alleged oral modification thereof.

Defendants in their answer denied that plaintiff had performed the terms of the option agreement, and alleged that plaintiff's rights had been terminated by notices duly given in accordance with said option agreement. Defendants also pleaded the defenses of res adjudicata and the statute of limitations.

The case was tried before the court without a jury, and the court found in substance that on August 2, 1938, and December 18, 1942, proper and sufficient written notices of default under said option agreement were given to appellant; that appellant failed to cure his defaults within a period of 30 days after said notices, or at all, and that any rights which appellant may have had under said option agreement of June 23, 1936, were thereby terminated; that in the prior action in ejectment all the issues raised by appellant in this action were raised as defenses and that all of said issues were determined adversely to appellant, and, therefore, all the issues raised by appellant herein have been conclusively determined and adjudicated against him and are res judicata, and this action is thereby barred and appellant is estopped and precluded from relitigating said issues in this action; that prior to this action, defendants Burtt, Feykert and Crummey had disposed of all of the shares of the Mining Company; that appellant's alleged cause of action is barred by Code of Civil Procedure sections 337(1), 338(4), 339(1) and 343. Plaintiff has appealed from the judgment in favor of defendants entered in accordance with said findings.

[1] In arguing for a reversal of the judgment plaintiff makes a number of contentions, but before discussing these we shall summarize the factual situation as shown by the record, bearing in mind the familiar rule that conflicting evidence must

be construed in the light most favorable to the respondents, and that every favorable inference and presumption which may reasonably be deduced from the evidence should be resolved in support of the judgment.

One of the defendants herein is the Baker Divide Mining Company, a California corporation, with a capital stock of 21,278 shares. One-half of the capital stock (10,639 shares) stood in the name of W. A. Richardson, a defendant herein. These shares were held by Richardson in trust as executor of the will of Beach Carter Soule. The other half of the capital stock (10,639 shares) was owned by defendant H. D. B. Soule.

On June 23, 1936, defendant Richardson, executor, and defendant Ruth Petit, executrix, of the will of Beach Carter Soule, and defendant H. D. B. Soule, hereinafter referred to as "sellers", executed an option, hereinafter called "option agreement", in writing, giving plaintiff James Maxfield the right to purchase all of the outstanding shares (21,278) of capital stock of the Baker Divide Mining Company, for the sum of \$25,000. The option agreement provided for payment of \$500 upon the execution of the option agreement; certain designated monthly installments payable on or before the first day of each month beginning with the first day of December, 1936, and ending on the first day of December, 1940; and the balance of \$11,200 to be paid on or before the first day of July, 1941.

The Baker Divide Mining Company, hereinafter referred to as "the Mining Company," was not a party to the option agreement. The primary asset of the Mining Company was approximately 1900 acres of mining lands.

It was provided in the option agreement that time was of the essence of the agreement and of the payments to be made, and in the event of default of the purchaser or his assigns to exercise the option granted, the rights of the purchaser or his assigns would cease and terminate, provided that if the stockholders should at any time claim that the purchaser had failed to do or perform anything which by the terms of the

option he had a right to do or perform, including the payment of any installments provided for, the purchaser should have a reasonable time, namely, thirty days thereafter, to perform, and the stockholders should send to the purchaser at 131 South Third Street, Las Vegas, Nevada, by registered mail, a notice in writing specifying the claimed default on the part of the purchaser, and demanding that such default be cured within thirty days; upon failure of the purchaser to perform all of the obligations on his part to be performed, which were specified in said notice, the stockholders should be entitled to the immediate possession of said property, and should also be entitled to retain all moneys theretofore paid by the purchaser or his assigns as rental for the use and occupation of said property; and upon such default and termination of this option, the corporation and the stockholders should be entitled to the immediate possession of the corporation property.

The option agreement further provided that no waiver by the sellers of any breach of the option agreement should be deemed to constitute a waiver of subsequent breaches. The plaintiff was given the right to assign any interest in the option agreement to any corporation duly licensed in the State of California; but not otherwise assign any rights without the written consent of the Mining Company or the sellers.

One Neal L. Dow and one R. Allen Hall were in possession of a portion of the mining property. Contemporaneously with the option agreement, plaintiff entered into a "lease and option" agreement with Dow and Hall, hereinafter referred to as "lease-option agreement," with the approval of the sellers, permitting Dow and Hall to enter upon a certain portion of the mining property for the purpose of mining so long as plaintiff was not in default under the option agreement and so long as Dow and Hall were not in default under their lease-option agreement. Dow and Hall were to pay a royalty of 10% of all the net mint or smelter returns on the sale of gold or other precious metals mined from the property by them. Plaintiff gave Dow and Hall an option to purchase the property occupied

by them for the sum of \$15,000 to be paid to the Mining Company and credited on the last payments required to be made by plaintiff to the sellers under the option agreement. The Mining Company was to deed the leased land to Dow and Hall upon payment of the \$15,000. The lease-option provided that "The right and possession herein granted to Dow and Hall for the purchase of said mining property shall immediately cease and terminate in the event that Maxfield shall fail to faithfully perform any of the terms of his option and agreement with the stockholders of the Baker Divide Mining Company. * * *" The lease-option agreement further provided that "In the event that Maxfield defaults in his 'Option to Purchase Stock in Baker Divide Mining Company, a corporation', above referred to, Dow and Hall shall have a period of thirty (30) days after notice to them of Maxfield's default, within which to cure the default of Maxfield in each and every respect in which he is in default, and shall, after thus curing such default, be subrogated to all of the rights of Maxfield * * *" in the option agreement. Hall subsequently assigned his interest in the lease-option agreement to Dow.

Pursuant to the option agreement plaintiff paid the \$500 down and paid \$100 on the first day of December, 1936, and on the first day of each month thereafter through June, 1937. According to the option agreement, on July 1, 1937, the monthly payments were to increase to \$150 per month. Plaintiff did not make a payment on July 1, 1937; but on July 7, 1937, plaintiff mailed a check for \$100 to Richardson, requesting that the monthly payments be continued at \$100 per month for another six months period. Richardson agreed to this. Plaintiff paid \$100 in August but failed to make his September 1st payment, or any payments thereafter except for a \$70 payment on July 1, 1938. Taxes came due and were paid by the Mining Company. A series of letters followed between Richardson and plaintiff and his attorney A. P. G. Steffes, to the effect that something had to be done about the default. The correspondence terminated on August 2, 1938, the latter being the date when the sellers sent a notice of can-

cellation of the option agreement to purchase the stock in the Mining Company pursuant to paragraph 10 of the option agreement and demanding that said defaults be cured within 30 days and notifying plaintiff that should he fail to cure the defaults within the 30 days the sellers and the corporation would re-enter and take possession of the mining property.

In the meantime one P. D. Burtt and P. J. Feykert, defendants herein, were operating a mine on property adjacent to the property of the Mining Company and they became interested in buying that portion of the property of the Mining Company immediately adjoining theirs. Burtt contacted Richardson and the latter advised him of the plaintiff's option and informed him of the fact that he, Richardson, only represented one-half of the stock and that the other half was owned by H. D. B. Soule. Burtt contacted H. D. B. Soule through the latter's attorney, Edgar T. Zook. H. D. B. Soule through Zook offered to sell his half of the stock for \$6,000.

In the meantime Richardson informed plaintiff of Burtt's interest in purchasing a portion of the property and one Hugh Milton, on behalf of plaintiff, offered to sell the 300 acres adjoining the mine of Burtt and Feykert to the latter for \$15,000.

On October 11, 1938, Richardson wrote the plaintiff that he was being importuned by Mr. Burtt and his associates for a sale of the property to them for \$12,500. Richardson also wanted to know what plaintiff could do since his sympathies were with the plaintiff.

About this time, Dow became interested in purchasing the property under lease to him for \$5,000, the money to be advanced by Mr. Crummey, an uncle of Dow.

On November 7, 1938, Richardson wrote plaintiff informing him of the possibility of an offer by Dow of \$5,000 for the land leased by Dow, and Richardson advised plaintiff to sell and "let it be credited on account of your contract to purchase the property." The letter further stated, "You will appreciate, I am sure, that you have defaulted in your contract and that the Company served notice upon you of this default

and that you are holding possession through the sufferance of the company, and it seems to me that you must do either one of two things, either pay up under your contract or make arrangements with Mr. Dow to let him purchase and make payment to our Company. Then I will endeavor to have the stockholders reinstate you and extend your time for the payment of the balance of the purchase price." Plaintiff expressed a willingness to cooperate.

On December 22, 1938, Richardson informed plaintiff by letter that Burt was willing to buy the Mining Company stock for \$12,500 " * * * and that something would have to be done in the matter at once. As you know, you are in default in your option to purchase this stock and notice has been given to you of such default, and you still remain in possession of the property through the sufferance of the stockholders and Baker Divide Mining Co." On December 30th plaintiff wired Richardson that Dow was ready to "close for \$5,000" for the land leased by him and that he, plaintiff, would cooperate, and requested Richardson to delay the "Burt matter."

On March 23, 1939, Richardson wrote plaintiff that Soule refused to sell any portion of the property unless the whole was taken care of.

Further communications were carried on between Wilton representing plaintiff and one William A. Boekel representing Dow; however, nothing developed in the matter.

In April, 1939, H. D. B. Soule sold his 10,639 shares of stock in the Mining Company to P. D. Burt for \$6,000.

Then follows correspondence between May 2, 1939, and July 12, 1939, participated in by plaintiff, Boekel, Richardson and Crummey, upon which plaintiff bases his contention that the written option agreement for the purchase of the stock was modified by reducing the purchase price from \$25,000 to \$12,000. However, it is clear from a reading of said correspondence that it was part of a series of negotiations and that no conclusion was reached, and the finding of the trial court that no agreement to modify the terms of the option

agreement was ever made is fully supported by the record.

The record shows further that on November 10, 1939, Boekel called plaintiff's attention to certain taxes on the mining property which were due and that under the option agreement plaintiff was bound to pay the taxes on the property. On November 17, 1939, plaintiff answered that he was unable to pay the taxes and asked Boekel to inquire if Crummey would consider paying the taxes and accepting plaintiff's note therefor. Crummey declined. On November 28th, plaintiff mailed the final tax installment of \$100.12 to Boekel.

On January 12, 1940, Boekel wrote plaintiff, informing him that insurance premiums on the property were due; and inquiring what plaintiff intended to do to reinstate his contract with the Mining Company and expressing concern over the continuing default.

On January 23, 1940, in answer to inquiry by plaintiff, Dow wrote plaintiff that there was to his knowledge no thought of any notice of default being sent from the Mining Company to plaintiff and that he was certain that Crummey had no such thought in mind.

On February 13, 1940, Boekel informed plaintiff of a proposed meeting of all of the parties involved to iron out the difficulties. This meeting was suggested by Rose, secretary of the Mining Company.

Plaintiff could not arrange to be at the meeting and requested it be put over until March. Plaintiff was unable to make the March meeting or a suggested meeting on April 10, 1940.

There were communications with Boekel concerning the payment of taxes, and assurances by plaintiff that he would take care of the matter.

On July 12, 1940, plaintiff suggested a meeting after August 1st.

There was further plaintiff-Boekel correspondence between May 14, 1941 and April 2, 1942, inclusive, but nothing resulted therefrom.

On December 18, 1942, a "Notice of Cancellation of Option to Purchase Stock in

Baker Divide Mining Company" signed by Feykert, Burtt, Crummey and Richardson was mailed to plaintiff, specifying defaults in the option agreement of June 23, 1936, and demanding that said defaults be cured on or before January 22, 1943.

On January 22, 1943, plaintiff filed an action in Orange County against the defendants in this suit for specific performance of the option agreement.

On March 13, 1943, the Mining Company filed an action in Placer County against the plaintiff, seeking to eject the plaintiff from the mining property of the corporation. The Mining Company alleged ownership, the right to possession, and the wrongful entry and withholding of possession by plaintiff. Plaintiff answered and cross-complained against the same defendants as in this action for specific performance of the option agreement. The Mining Company demurred to the answer and cross-complaint and it was stipulated that the demurrers be sustained and plaintiff filed a first amended answer and first amended cross-complaint. The Mining Company demurred to the first amended answer and the first amended cross-complaint. On March 15, 1945, the demurrers were sustained and the court granted the motion to strike plaintiff's first amended cross-complaint without leave to amend.

On March 24, 1945, plaintiff filed this action in Placer County containing substantially the same allegations as his first amended cross-complaint.

On January 15, 1946, the ejectment suit of the Mining Company went to trial and judgment was entered for the Mining Company on June 29, 1946. This judgment was affirmed by this court in January, 1948, 83 Cal.App.2d 241, 188 P.2d 538.

Appellant outlines his grounds for reversal of the judgment as follows:

"The trial court erred in finding and holding adversely to appellant on all and each of the following contentions raised by appellant:

"1. Maxfield was entitled, upon being served with a purported Notice of Cancellation under Paragraph 10 of the Option Agreement, to have a court de-

termine the rights and obligations of all parties to the transaction, concerning which there was an obvious controversy.

"2. Punctual payment under the Option Agreement, according to its terms, was waived, and a proper notice under Paragraph 10 of the agreement was necessary, before Maxfield forfeited his rights thereunder.

"3. No proper notice of forfeiture, under Paragraph 10 of the Option Agreement, has ever been given to Maxfield.

"4. When the notice and demand for payment were mailed to Maxfield, they were ineffectual upon which to base a forfeiture, since the stock was not tendered or offered to be delivered to Maxfield, if he paid the full purchase price.

"5. This action is not barred by the statute of limitations.

"6. The material issues in this action are not *res adjudicata*."

Respondents outline their answer to these contentions of appellant as follows:

"In reply we contend that there was no valid, or any, modification of the option agreement, and no valid, or any, agreement by Crummey to turn his stock over to Maxfield for \$1000 and the 404 acres of land, and, further, that:

"1. The action is barred by the statute of limitations.

"2. All the issues in this action are *res judicata*, having already been adjudicated against plaintiff by both the trial court and this court.

"3. Plaintiff, having failed to exercise his option, cannot demand performance by defendants.

"4. Plaintiff's rights under the option agreement were terminated by the notices of August, 1938 and December, 1942.

"5. Plaintiff cannot prevail in this action for specific performance for the reasons that (a) there was no mutuality in the option agreement, (b)

plaintiff has not performed, or offered to perform, on his own part, and (c) defendants have long since disposed of the stock and there is nothing upon which a decree of specific performance can operate."

[2, 3] Appellant's contention that punctual payments under the option agreement were waived by defendants is without merit. The option agreement provided that the agreed price of \$25,000 was to be paid as follows: \$500 on the execution of the option, the balance payable: seven monthly installments of a hundred dollars each, on or before the first day of December, 1936, January, February, March, April, May, and June, 1937; monthly installments of \$150 each for the second six months of 1937; of \$200 each for the first six months of 1938; and \$250 each for the second six months of 1938; of \$300 each for the first six months of 1939; and \$350 each for the second six months of 1939; \$400 each for the first six months of 1940; and \$450 each for the second six months of 1940; and the balance of \$11,200 on or before July, 1941. As hereinbefore set forth, appellant made his installment payments pursuant to said terms through June, 1937. On July 7, 1937, he paid \$100 instead of the \$150 installment that was due, and requested that the monthly payments be kept at \$100 for another six months period. Defendant Richardson agreed to this. Appellant paid \$100 in August, 1937, but made no further payment except a \$70 payment on July 1, 1938. Nor did he pay the taxes as agreed. Demands for payment were made upon him after June 1, 1937. The record amply supports the finding of the trial court that there was no waiver of punctual payments under the option agreement. Certainly no waiver is shown by defendants' demands for payment of delinquent installments, nor by failure to declare a forfeiture. Section 11 of the option agreement provides that no waiver by the stockholders of any breach of the agreement or cause for forfeiture shall be deemed to be waiver of breaches or causes for forfeiture subsequently arising. It was therefore not necessary for defendants to notify appellant after default that

strict performance would be required in the future. *Fageol Truck & Coach Co. v. Pacific Indemnity Co.*, 18 Cal.2d 748, 117 P.2d 669; *Deevy v. Lewis*, 54 Cal.App.2d 24, 128 P.2d 577; *Grimes v. Steele*, 56 Cal.App.2d 786, 133 P.2d 874. The fact that defendant may have made demands for overdue installments does not show a waiver of defaults. *Buckey v. McGraw*, 206 Cal. 541, 275 P. 221; *Pitt v. Mallalieu*, 85 Cal.App.2d 77, 85, 192 P.2d 24.

It is apparent from the record that appellant was not in a financial position to make the agreed payments after June of 1937, and that he was endeavoring by various negotiations to keep his option alive but was not successful in such negotiations. Even after appellant was served with notice of default on August 2, 1938, he continued such negotiations but no agreement was arrived at, and on December 18, 1942, he was given definite notice by all of the stockholders of his default and the termination of his option unless he cured his defaults on or before January 22, 1943.

[4] Appellant contends also that no proper notice of default was given to him in accordance with paragraph 10 of the option agreement. The record shows that on December 18, 1942, the notice of cancellation of option signed by defendants Feykert, Burt, Crummey and Richardson was mailed to appellant. Appellant argues that this notice was not effectual because it was not signed by the persons who originally signed the agreement. This same contention was urged by appellant in *Baker Divide Mining Co. v. Maxfield*, supra, and in deciding same adversely to appellant's contention, this court there said, 83 Cal.App.2d at page 252, 188 P.2d at page 544:

"The third contention of appellant is that the court erred in overruling his objection to the introduction in evidence of the notice of default which was signed by the transferees of the stock who were not the stockholders who signed the original option agreement. The objection was based upon the claim that the notice was fatally defective because it was not signed by the original optionors, and further be-

cause it notified appellant to pay past due payments to the transferees of the stock.

"As hereinbefore stated, appellant gave his written consent to the transfer of half the shares to Crummey and thereby, surely at least Crummey was authorized to sign the notice. Furthermore, appellant was not injured but favored by the notice. It gave him more than 30 days to cure his default under his option agreement and he did nothing about it; he took no action nor did he make any offer to any one to perform, despite the fact that he was then woefully in default. Whether signed by the original shareholders or their transferees, the notice conformed to the requirements of the option agreement and appellant should have taken some action within the more than 30 days allowed him."

[5] Appellant contends further that when the notice and demand for payment were mailed to appellant they were ineffectual to effect a forfeiture since the stock was not tendered or offered to be delivered to appellant if he paid the full purchase price. The following quotation from *Baker Divide Mining Co. v. Maxfield*, supra, 83 Cal.App.2d at pages 252-253, 188 P.2d at page 545, is equally applicable to appellant's present contention:

"* * * appellant argues that 'the most fatal omission in giving the 30-day notice was the failure to tender the stock when the demand was made for the entire balance of the purchase price.' Since appellant did nothing after the receipt of the notice, it seems obvious that a tender of the stock would have been useless. There is nothing in paragraph 10 creating a reciprocal obligation; it merely provides that the optionors shall give appellant 30 days to cure 'his' default, and there is no provision calling upon optionors to tender the shares of stock as a condition precedent to payment.

"In *McClintick v. Leonards*, 103 Cal. App. 768, 773, 285 P. 351, the court said: 'If an offer of performance of

an obligation be defective, the offeree must object on that ground or the defect is waived, and he cannot be heard to urge such objection in a subsequent suit. *Lockhart v. J. H. McDougall Co.*, 190 Cal. 308, 212 P. 1.'"

Appellant contends also that the court erred in finding that all of the issues in the instant action were conclusively determined and adjudicated against him in the former action of *Baker Divide Mining Company v. Maxfield*, and are *res adjudicata*.

As hereinbefore stated, on March 13, 1943, the Baker Divide Mining Company commenced an action against appellant in which it sought to eject appellant from the mining property of the corporation. Appellant in that action sought by way of cross-complaint to bring in the present respondents so that his rights under the option agreement could be determined, but the court granted a motion to strike out said cross-complaint on the grounds that the present respondents were not essential parties in determining the issue of possession and that the only issue in the former action was the right to possession of the real property as between the corporation and appellant. Appellant argues that respondents cannot, therefore, properly contend that the issues presented here have been adjudicated previously.

In the action in ejectment, appellant's second amended answer alleged substantially all of the allegations of his second amended complaint in the present action; and respondent's amended complaint in the prior ejectment action contained a supplemental separate and second cause of action containing language corresponding to that contained in appellant's amended answer in the former action; and all parties tried the prior ejectment case on the assumption that the option agreement was an issue and evidence was admitted upon those issues.

Respondents in this action testified in the ejectment action upon the very issues raised in this action. The trial court held in the ejectment action that respondent's allegations were true and that the allegations of appellant's answer were untrue, and the judgment in the ejectment action was af-

firmed by this court. *Baker Divide Mining Co. v. Maxfield*, 83 Cal.App.2d 241, 188 P.2d 538.

[6,7] Matters not in issue in the previous action are not *res adjudicata*. A judgment is not an adjudication of those matters which were not and could not properly be relied upon and determined in the previous action; but are conclusive where the requisite jurisdiction exists, of all those matters which it clearly adjudicates. The Supreme Court said in *Bernhard v. Bank of America, etc.*, 19 Cal.2d 807, at page 813, 122 P.2d 892, 895: "In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" The Supreme Court then cites certain cases and states that "to the extent that they are inconsistent with this opinion, are overruled."

It is true that although respondents in the present action, other than respondent Baker Divide Mining Company, were not parties to the ejectment action, yet appellant was a party to said action and set up a separate defense in his answer containing substantially the same allegations as are in his complaint in the instant action. It would seem, therefore, that under the decision in *Bernhard v. Bank of America, etc.*, supra, there is strong support for the court's finding that the issues in the instant action were adjudicated against appellant in the former action. However, in view of the fact that all of the issues were fully tried in the instant action, and we have hereinbefore held that the court correctly determined upon sufficient evidence that appellant was in default under the option agreement and that his rights thereunder were terminated in accordance with said

agreement, we deem it unnecessary to decide whether the judgment in the former action is *res adjudicata* as to the issues in the present action.

No other points raised require discussion.

[8] We are convinced that the following quotation from the able memorandum opinion of the trial judge is fully supported by the record:

"In the plaintiff's complaint filed March the 24th, 1945, he alleges his ability and willingness to pay any amount which the Court may find due from him. Such belated offer after his long default, since July 1, 1941, and never before communicated to defendants, viewed in the light of his past inexcusable failure to comply with the terms of payment required by the option; the notice of default and cancellation herein before noticed, comes with little force or evidentiary value. He had ample time and opportunity to make a valid tender in 1938 and 1942, if he had at those times the financial ability to cure the default, or intended in good faith to cure his default. To give such offer serious consideration that would affect this action would be condoning and excusing his long defaults, allowing him to speculate with other people's property at no expense to himself after the property had been disposed of to others and values had changed. Specific performance is only allowed in the interest of justice, and before the principles of equity may be appealed to for relief by way of specific performance, one must have a just and equitable cause of action, which plaintiff has failed to demonstrate in this action."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

PEOPLE v. FRANCIS. *

Cr. 4998.

District Court of Appeal, Second District,
Division 2, California.

Oct. 16, 1953.

Rehearing Denied Oct. 26, 1953.

Hearing Granted Nov. 12, 1953.

Prosecution upon charge of issuing checks without sufficient funds. The Superior Court of Los Angeles County, Kurtz Kauffman, J., refused to allow defendant to withdraw plea of guilty and entered judgment sentencing defendant to one year imprisonment and defendant appealed. The District Court of Appeal, McComb, J., held that trial court did not abuse its discretion in refusing defendant permission to introduce evidence in support of defendant's motion for substitution of plea of not guilty for one of guilty and in refusing to make substitution.

Judgment affirmed and appeal from order denying motion to withdraw plea of guilty dismissed.

1. Criminal Law ⇨1023(3)

An order denying a motion for change of plea is not appealable.

2. Criminal Law ⇨274, 1149

Statute providing that court may for good cause shown permit plea of guilty to be withdrawn and plea of not guilty substituted means that substitution of plea of not guilty is within the sound discretion of the trial judge whose action will be upheld unless a clear and convincing abuse of discretion is shown. Pen.Code, § 1018.

3. Criminal Law ⇨274

Whether a court shall receive oral evidence in determining motion for permission to withdraw a plea of guilty is within the sole discretion of the trial judge. Pen.Code, § 1018.

4. Criminal Law ⇨273

Where defendant entered plea of guilty to charge of issuing check without sufficient funds, he admitted every element of offense charged, including the intent to is-

sue the check, knowing he had insufficient funds in drawee bank to cover it.

5. Criminal Law ⇨274

Where defendant entered plea of not guilty but obtained a continuance because of his substitution of counsel, and at the time of trial defendant was allowed to change plea of not guilty to one of guilty and was given permission to file application for probation, trial court did not abuse discretion in refusing defendant permission to introduce evidence in support of his subsequent motion to withdraw plea of guilty or in denying defendant's motion for substitution of plea of not guilty. Pen.Code, § 1018.

6. Criminal Law ⇨274

In prosecution for issuing checks without sufficient funds, record did not establish that defendant was not guilty or under influence of any misrepresentation, fraud, or other improper inducement when he entered plea of guilty. Pen.Code, § 1018.

Ray L. Smith, Los Angeles, for appellant.
Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

[1] Defendant appeals from a judgment after his plea of guilty to issuing a check without sufficient funds. There are also (1) a purported appeal from the order denying defendant's application to withdraw his plea of guilty and enter a plea of not guilty, (this was a nonappealable order and must be dismissed, see *People v. Tidwell*, 108 Cal.App.2d 60, 62[1], 238 P.2d 21; *People v. Morgan*, 9 Cal.App.2d 612, 617 [4], 50 P.2d 1061), and (2) the order denying his motion to vacate and set aside his judgment.

Facts: April 25, 1952, defendant was arraigned on an information charging two counts of issuing checks without sufficient funds. Defendant entered a plea of not guilty to each count as charged in the information and the case was set for trial on June 19, 1952.

* Subsequent opinion 267 P.2d 8.

June 3, 1952, defendant substituted William W. Larsen as his counsel and the case was thereafter continued to June 30, 1952.

On the latter date defendant represented by his present counsel requested permission to withdraw his plea of not guilty to the first count of the information which was granted and defendant entered a plea of guilty thereto, and was given permission to file an application for probation. After several continuances the application for probation came on for hearing on October 10, 1952, at which time defendant made a motion under section 1018 of the Penal Code to withdraw his plea of guilty and enter a plea of not guilty. In support of his motion he made an offer of proof to the effect that if defendant were permitted to take the stand and testify he would testify to substantially the same matters as was contained in his statement to the probation officer, to wit, that he thought he had made arrangements to cover the checks which he had issued, and that he had no present abiding intention at the time to issue a check without sufficient funds.

Defendant's motion was denied as was his application for probation and he was sentenced to serve a term in the state prison.

Thereafter defendant on the grounds heretofore stated made a motion to vacate and set aside the judgment which was also denied.

Question: Did the trial court abuse its discretion in denying defendant's application to (1) withdraw his plea of guilty and enter a plea of not guilty, and (2) vacate and set aside the judgment?

No. Section 1018 of the Penal Code provides in part: " * * * On application of the defendant at anytime before judgment the court may, * * * for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." (Emphasis added.)

[2] In construing this section it has been held that the matter of permitting withdrawal of a plea of guilty and the substitution of a plea of not guilty is within the sound discretion of the trial judge whose action must be upheld unless a clear and convincing abuse of discretion is shown.

(People v. Griffin, 100 Cal.App.2d 546, 548 [2], 224 P.2d 47; People v. Outcault, 90 Cal.App.2d 25, 29[6], 202 P.2d 602.)

[3, 4] It is likewise settled that in determining a motion for permission to withdraw a plea of guilty and enter a plea of not guilty pursuant to the provisions of section 1018 of the Penal Code, whether oral evidence shall be received and defendant examined upon such motion, rests solely in the discretion of the trial judge. (People v. Kirk, 109 Cal.App.2d 203, 209 [6], 240 P.2d 630). Since a plea of guilty admits every element of the offense as charged (People v. Outcault, supra, 90 Cal. App.2d 29[5], 202 P.2d 602), defendant by his plea of guilty admitted he had the intent of issuing a check knowing he had insufficient funds in the drawee bank to cover it.

[5] Applying the foregoing rules to the facts of the present case it is clear that the trial court did not abuse its discretion in denying defendant permission to introduce evidence in support of his motion to withdraw his plea of guilty or in denying such motion.

People v. McGarvy, 61 Cal.App.2d 557, 142 P.2d 92, is clearly distinguishable on its facts from the present case. The defendant there pled guilty to a charge of manslaughter after having been permitted to talk to an attorney for only 20 to 30 minutes, who advised him to plead guilty. Thereafter he was refused permission to talk to anyone and permission to see anyone was denied. Also McGarvy had only an eighth-grade education. The appellate court properly held there was an abuse of discretion under such facts in refusing to permit defendant to withdraw his plea of guilty.

[6] The record is devoid of any such situation in the case at bar. On the contrary, a plea of not guilty was originally entered April 25, 1952; thereafter defendant substituted his attorneys and when the case was called for trial July 30, 1952, he was permitted, while represented by an attorney, to withdraw his plea of not guilty and enter a plea of guilty. There is nothing in the record to indicate defendant was

not guilty or that he entered his plea of guilty while under the influence of any misrepresentation, fraud or other improper inducement.

He has failed to show any prejudicial error in the proceedings in the trial court.

The judgment and order denying defendant's motion to vacate and set it aside are each affirmed. The purported appeal from the order denying defendant's motion to withdraw his plea of guilty is dismissed.

MOORE, P. J., and FOX, J., concur.



121 Cal.App.2d 59

CARRARA v. CARRARA.

Civ. 15746.

District Court of Appeal, First District,
Division 1, California.

Nov. 4, 1953.

Rehearing Denied Dec. 4, 1953.

Hearing Denied Dec. 30, 1953.

Divorce action wherein joint custody of minor child was awarded to parties. Decree was later modified to give the father sole custody of child. On wife's motion to modify decree, the Superior Court for the City and County of San Francisco, Eustace Cullinan, Jr., J., set aside previous order which gave father sole custody of child and father appealed. The District Court of Appeal, Bray, J., held that where wife's attorney who represented her at previous modification hearing, wrote husband that he no longer represented wife, new attorney's presence in court constituted acceptance of substitution of attorneys, and wife's failure to have first attorney's consent to substitution would not deprive court of jurisdiction.

Order affirmed.

1. Process ⇨72

Where service on attorney of record is permitted, such service binds client until attorney is discharged or substituted out of the case in manner provided by law.

2. Attorney and Client ⇨75(1)

Divorce ⇨164

Where wife, on her motion to modify divorce decree, substituted another attorney in place of attorney which represented her at prior modification hearing without first obtaining first attorney's consent to substitution, but first attorney had previously written husband that he no longer represented wife, new attorney's presence in court constituted acceptance of the substitution, and wife's failure to obtain first attorney's consent would not deprive court of jurisdiction.

Benjamin F. Marlowe, Oakland, for appellant.

Bert W. Hirschberg, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from an order setting aside an order modifying a final decree of divorce.

Question Presented:

Did the irregularity in substitution of plaintiff's attorney deprive the court of jurisdiction to hear plaintiff's motion?

Record.

In a final decree of divorce, the joint custody of their minor child was awarded the parties. In May, 1952, the decree was modified to define defendant's right of visitation. In that proceeding plaintiff was represented by Attorney Murray. August 15th, defendant mailed to the latter a notice that on August 22nd he would move to modify the final decree to give defendant exclusive custody of the child. August 16th, Attorney Murray wrote defendant's attorney to the effect that his services for plaintiff were concluded with the filing of the previous modification order; that he had never been formally substituted for plaintiff's attorney of record who represented her at the time of the final decree; that plaintiff had disregarded his advice, had not paid his fee, had not given him her address nor communicated with him; and that "in the absence of judicial compulsion my legal counsel and representation

are no longer available to plaintiff. * * *

In the circumstances I think service should properly be made on the plaintiff. You can probably obtain plaintiff's address from Mrs. Carrara [defendant's new wife] who is more familiar with the plaintiff's location and address than I am. Thank you for giving me this opportunity to set the record straight, and conclude the matter in this office." No effort was made to notify plaintiff. August 22nd, defendant appeared and stated that Attorney Murray had written that he did not know where plaintiff was. On defendant's testimony the court made an order modifying the decree and giving defendant sole custody of the child subject to plaintiff's right of visitation.

September 4th, Attorney Hirschberg, as attorney for plaintiff, served upon defendant's attorney a notice of motion to set aside the order modifying the final decree of divorce, to be heard the next day. The grounds of the motion were "no proper service of the notice of motion to modify was served on the plaintiff herein; that *plaintiff was not represented at the hearing of said motion.* * * *" (Emphasis added.) At the hearing Hirschberg filed a substitution of himself as attorney for plaintiff. Defendant's attorney appeared, objected to the hearing and to Attorney Hirschberg representing plaintiff, on the ground that the substitution of attorneys did not comply with sections 284 and 285, Code of Civil Procedure.

The court then stated that if the substitution was not sufficient it would continue the hearing until a proper one could be obtained as it wanted to hear the motion on the merits. Thereupon defendant asked for a continuance of the hearing because the shortness of the notice (an order shortening time for service had been made) did not give him time to prepare. The matter was continued to September 10th. Defendant filed a written objection to the appearance of an attorney not of record and to the jurisdiction of the court. The objection was argued and overruled and the court made the order appealed from setting aside the previous order.

Substitution of Attorneys.

[1] Defendant now contends that the grounds of the notice of motion were insufficient to justify the setting aside of the previous order. This point was not made in the lower court. There, the sole objection to the proceeding was the insufficiency of the substitution. The ground that no proper service of the motion to modify had been made was not well based, in that it has been held that where service on the attorney of record is permitted such service binds the client until the attorney is discharged or substituted out of the case in the manner provided by law. *Reynolds v. Reynolds*, 21 Cal.2d 580, 134 P.2d 251. It should be pointed out that if defendant is correct in his contention that the order made on Attorney Hirschberg's motion is void, then the previous order modifying the decree defining defendant's right of visitation is likewise void, as that order was made on stipulation of an attorney for plaintiff who had not been formally substituted for her then attorney of record.

While the service on Murray, the then attorney of record for plaintiff, was technically a service on plaintiff, there was *in fact* no service upon her and as stated in the second ground of the notice of motion to set aside the order, "plaintiff was not represented at the hearing of said motion. * * *" Obviously, although service was proper, plaintiff did not actually have her day in court, and had the court known the true circumstances at the time of the hearing of the motion to modify it would have given her a chance to be heard.

[2] Defendant's main contention is based on the insufficiency of the substitution. It consisted merely of a statement signed by plaintiff to the effect that she substituted Hirschberg as her attorney in the action in place of "all my prior counsel therein." It did not comply with the statutory requirements in that it did not contain a consent by Attorney Murray, an acceptance by Attorney Hirschberg, nor was it served on defendant. As pointed out by the court, Attorney Hirschberg's presence in court constituted an acceptance. The main

purpose of a substitution of attorneys is that both the court and opposing counsel may know that they are dealing with an attorney who has power to bind the party he purports to represent. Defendant knew from Attorney Murray's letter that Murray no longer represented plaintiff. That letter was read into evidence at the hearing. From it, the court could reasonably conclude that a formal consent by Murray to a substitution was not required. Defendant appeared in court on the notice given by Attorney Hirschberg. Under the circumstances of this case plaintiff's failure to have Attorney Murray's consent to the substitution was immaterial. There are many cases using such language as "Only the attorney of record is entitled to recognition by courts." *Drummond v. West*, 212 Cal. 766, 300 P. 823, 824. See also, among others, *Board of Commissioners v. Younger*, 29 Cal. 147; *Turner v. Caruthers*, 17 Cal. 431; *McMunn v. Lehrke*, 29 Cal.App. 298, 155 P. 473; *Anglo-California Trust Co. v. Oakland Rys.*, 191 Cal. 387, 216 P. 578; 3 Cal.Jur. 637, § 45. But in none of them were the circumstances such as here. In fact in none of them was there a substitution of attorneys signed by the party. None of them holds that an irregularity in the substitution of attorneys deprives the court of jurisdiction.

Here, as said in *Sedarovich v. Paul*, 16 Cal.App.2d 452, 454, 60 P.2d 871, concerning the failure to file a substitution of attorneys already executed, "No one was misled to his prejudice * * *." 16 Cal. App.2d at page 455, 60 P.2d at page 873. In *Withers v. Little*, 56 Cal. 370, no notice of the substitution of attorneys by defendant was served upon plaintiff. However, the attorneys for plaintiff acknowledged receipt of the notice of appeal prepared by the substituted attorney. The court held that if plaintiff's attorneys did not intend to recognize the substituted attorney they should have refused to acknowledge service. In our case, if defendant did not intend to recognize Attorney Hirschberg as plaintiff's attorney, defendant should not have appeared at the hearing. In ac-

cord, *Livermore v. Webb*, 56 Cal. 489. In *Warden v. Lamb*, 98 Cal.App. 738, 277 P. 867, defendant originally appeared *pro. per.* Later she filed a document "associating" one Hopkins as attorney of record in the case. Later Hopkins moved for the substitution of himself and another attorney as attorneys of record in place of himself alone. Plaintiff objected, contending that the original "association" of an attorney did not comply with sections 284 and 285 of the Code of Civil Procedure (the sections defendant here relies upon). The court held, 98 Cal.App. at page 743, 277 P. at page 869: "So far as sections 284 and 285 of the Code of Civil Procedure are involved in this action, they are pertinent only in that they required the defendant to give the appellant due notice of attorneys which she was authorized or her attorneys were authorized to recognize. When that was done, as appears by the record of the court was done in this case, the appellant was left no cause for complaint. In so far as any irregularity of procedure may have occurred in the entry of the attorneys of record by the order of the court, or as to any informality in the writing signed by the defendant, employing her attorneys, we think that section 4½ of article 6 of the Constitution is applicable." In *McMunn v. Lehrke*, *supra*, 29 Cal. App. 298, 155 P. 473, where a judgment based upon notice of trial given to defendant's attorneys of record who notified plaintiff's attorneys that they no longer represented defendant was reversed, the court stated that it is better to dispose of " * * * causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised * * * in such a manner as will subserve rather than impede or defeat the ends of justice." 29 Cal.App. at page 309, 155 P. at page 477.

The order is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

120 Cal.App.2d 896

PEOPLE v. MORA.

Cr. 2451.

District Court of Appeal, Third District,
California.

Oct. 29, 1953.

Hearing Denied Nov. 24, 1953.

Prosecution for attempted murder. The Superior Court, Stanislaus County, Hawkins, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where defendant had been unlawfully denied right to counsel at first preliminary hearing, testimonial statements made by defendant at such hearing were inadmissible at subsequent trial.

Reversed.

1. Judgment ☞751

The doctrine of *res judicata* is applicable to criminal actions.

2. Judgment ☞751

Where question whether defendant had been unlawfully denied services of counsel in first preliminary hearing was raised by motion to set aside information and was decided in defendant's favor, the determination was *res judicata* against the people in subsequent proceeding for same offense.

3. Judgment ☞949(2)

Where defendant in support of objection to admission of his testimony at first preliminary hearing advised court of his position that matter was inadmissible because of granting of motion to set aside previous information, defendant sufficiently grounded objection on doctrine of *res judicata*.

4. Criminal Law ☞539(2)

Where first information had been set aside because defendant had been unlawfully denied services of counsel at first preliminary hearing, testimonial statements made by defendant under cross-examination at first preliminary hearing were inadmissible in subsequent prosecution for same offense.

5. Constitutional Law ☞268

Denying the right to counsel in criminal proceedings is denial of due process.

Sutter, Elledge & Carter, Modesto, for appellant.

Edmund G. Brown, Atty. Gen. by Gail Strader, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Appellant was charged by information with three counts of attempted murder. He was convicted on all three and he appeals from the judgment and from the trial court's order denying his motion for new trial.

The occurrences giving rise to the prosecution of appellant took place at the Star Cafe on Highway 99 in Turlock. Appellant fired five or six shots from a pistol, striking three men and inflicting serious wounds, though none died therefrom. Appellant first entered the cafe for coffee and during his stay got into an altercation with one Pete Garcia. He returned later with a gun and the shooting followed. His defense was that he had been set upon and had fired in self-defense. He took the stand in his own defense and during his cross-examination by counsel for the People there was introduced in evidence over his objection certain statements he had made while on the stand under oath in a preliminary examination. His principal contention on appeal is that prejudicial error was committed by the admission of these statements. He also contends that the evidence was insufficient to support his conviction, but we think this contention cannot be sustained. However, it is unnecessary to treat thereof specifically because we have concluded that the judgment and order appealed from must be reversed because of the admission of his testimony given at said preliminary.

Appellant is a farm laborer of Mexican extraction, unable to adequately speak or understand the English language and completely unfamiliar with judicial proceedings. Throughout all the proceedings involved in this appeal an interpreter was used.

When appellant was first arrested upon a complaint charging attempts to murder he was in due time taken before a committing magistrate. He was held to answer and an information charging him with three of-

fenses of attempted murder was filed. Counsel was appointed by the trial court to defend him and in proper time moved under Section 995 of the Penal Code that the information be set aside because the defendant had not been legally committed. The motion was specifically based upon the ground that the defendant had been denied the right to counsel in violation of Section 13, Article 1 of the California Constitution and in violation of the 14th Amendment to the Constitution of the United States. This motion was granted by the trial court. Thereafter a new complaint was issued against the defendant, containing the same charges as the first. He was regularly committed for trial by the magistrate at a preliminary hearing and was thereafter informed against, tried and convicted. When counsel for the People sought during the trial to introduce portions of the testimony of defendant at the first preliminary adequate objections were made that the same were inadmissible because they had been elicited during proceedings wherein the accused had been denied counsel. After considerable discussion in chambers, out of the presence of the jury, during which proceedings the matter was fully discussed by the court and counsel for both sides, the ruling of the court was adverse to defendant and the statements were admitted. If admissible they were clearly material. Stated narratively, the testimony admitted was as follows: When I came back into the restaurant I was angry at Pete Garcia. As I came in I told him to take out his knife and he tried to but I fired and he didn't do anything except throw a glass of beer at me. I told him to take out his knife because he had already threatened me. I was going to shoot him when he did. There was other testimony introduced concerning his shooting the three men whom he was charged with attempting to murder, but the foregoing was the most damaging evidence as it directly affected his claim of self-defense and was contradictory in part of his testimony at the trial, thus placing his credibility in issue before the jury.

[1-3] The record as to what had occurred at the first preliminary resulting in

the denial of the accused's right to counsel is not as clear as it might be, but since the fact of such denial has been determined by the trial court the matter is *res judicata* against the People. The doctrine of *res judicata* has been applied in California in criminal cases. *People v. Beltran*, 94 Cal.App.2d 197, 202 et seq., 210 P.2d 238, and cases cited. It is stated in 50 C.J.S., Judgments, § 754, p. 267, that this principle is applicable to criminal proceedings as well as to civil proceedings. In *United States v. Carlisi*, D.C. 32 F.Supp. 479, it was said by headnote: "In prosecution for conspiracy to set up stills * * *, testimony of agents who had made search and seizure which court, in previous prosecution against one defendant for possession of still, had decided was illegal, was inadmissible because judgment of acquittal in previous prosecution rendered upon merits and decision that search and seizure was illegal were 'res judicata' of rights of parties." In the annotation to *Harris v. State of Georgia*, 193 Ga. 109, 17 S.E.2d 573, 147 A.L.R. 980, 992, it is given as a general rule that "The doctrine of *res judicata*, by which a fact or matter distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties, is applicable to judgments in criminal prosecutions." See also *U. S. v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161, 3 L.R.A. 516. In *People v. Grzesczak*, 77 Misc. 202, 137 N.Y.S. 538, 541, the court said: "The only litigated question of fact on both these indictments is the presence of the accused when these crimes were committed. That question having once been decided, it cannot again be tried." While the determination here involved was responsive to a motion, nevertheless to such determination the doctrine of *res judicata* is applicable where the particular proceedings admit of a full hearing on the merits and especially where, as here, the resulting order is appealable. 60 C.J.S., Motions and Orders, § 65 g. The text referred to declares: "Final orders, or orders affecting substantial rights, fully litigated, and from which an appeal lies, are conclusive of the matter adjudged and, under the doctrine of *res ju-*

dicata, binding on the parties in all subsequent proceedings, unless reversed or modified by an appellate court". It is clear from this record that the factual question of whether or not defendant had been unlawfully denied the services of counsel in the first preliminary was squarely put before the court by his motion to set aside the information and was decided in his favor. It follows, therefore, that when at the trial in support of his objection to the admission of his testimony in the first preliminary, he advised the court of his position that the matter was inadmissible because of the previous ruling on the motion, he sufficiently grounded his objection upon the doctrine of res judicata.

[4,5] We think that testimonial statements made by an accused under cross-examination, at a preliminary hearing at which he has been denied his constitutional right to counsel, cannot be thereafter admitted in evidence against him over his objection. To permit such statements to be introduced would do violence to all the rules of fair play. To condone such a practice could render futile the right to the aid of counsel so carefully preserved by our Constitutions, our statutes and our decisions. It would open the gate to unlawful preliminary hearings at which damaging statements would be elicited; to be followed by properly conducted proceedings leading to trial whereat the statements so obtained could be used for conviction. The United States Supreme Court has held in *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R.2d 1396, that the wrong in unlawfully obtaining evidence may be so great that its use thereafter would amount to a denial of due process. Denying the right to counsel in criminal proceedings is the denial of due process. *People v. Zammora*, 66 Cal.App.2d 166, 234, 152 P.2d 180. Giving to the adjudication that appellant's right to counsel was denied, the weight to which it is entitled we think the trial court erred in admitting the statements made by accused at the first preliminary. To admit evidence so obtained into the subsequent trial was to carry into that trial the same denial of due

process which the court had already adjudicated had occurred at the preliminary.

The judgment and the order appealed from are reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; TRAYNOR, J., dissenting.



121 Cal.App.2d 64

METZENBAUM v. METZENBAUM et al.

(three cases).

Civ. 19349.

District Court of Appeal, Second District,
Division 1, California.

Nov. 4, 1953.

Hearing Denied Dec. 30, 1953.

Malicious prosecution action by son against father and sister arising out of suit for possession of trust fund, consolidated with another malicious prosecution action by son against parents arising out of suit charging son with misconduct of partnership affairs, and an action by son against parents to set aside allegedly fraudulent conveyance of father's property to prevent collection of judgments. The Superior Court, Los Angeles County, J. A. Smith, J., entered judgments for plaintiff, and parents appealed. The District Court of Appeal, Scott, J., pro tem, held that evidence sustained trial court's findings that father was without probable cause in instigating suits forming basis of son's actions for malicious prosecution.

Affirmed.

I. Malicious Prosecution — 64(2)

In malicious prosecution action by son against father and sister, arising out of suit for possession of trust fund, consolidated with another malicious prosecution action by son against parents, arising out of suit charging son with misconduct of partnership affairs, evidence sustained finding that father was without probable cause

in instigating suits forming basis of son's actions for malicious prosecution.

2. Appeal and Error ⇨1010(1)

On appeal in malicious prosecution actions, findings of trier of facts as to probable cause, or absence thereof, will not be disturbed if supported by substantial evidence.

3. Malicious Prosecution ⇨16

Necessary elements of action for malicious prosecution are judicial proceeding favorably terminated, lack of probable cause, and malice.

4. Malicious Prosecution ⇨56

One seeking to recover damages for malicious prosecution has burden of proving judicial proceeding favorably terminated, lack of probable cause, and malice.

5. Malicious Prosecution ⇨25(2)

Father's assertion that he acted on advice of counsel in instigating suits against son for possession of trust fund and charging son with misconduct in partnership matters, did not give rise to inference that father had probable cause in instigating suits, where father was attorney of 40 years experience, and suits, were, in fact, known to be without probable cause.

6. Malicious Prosecution ⇨25(1)

Good faith is an element of probable cause in malicious prosecution cases.

7. Malicious Prosecution ⇨69

In son's malicious prosecution action arising out of suit by father and sister for possession of trust fund, evidence that father was without probable cause in filing suit for possession of trust fund and in securing injunction preventing payment of royalties to son from trust fund, was sufficient to support award of \$5,000 compensatory damage, \$2,500 attorneys' fees, and \$2,500 exemplary damage.

8. Malicious Prosecution ⇨69

Award of \$10,000 damage for malicious prosecution of suit charging misconduct in partnership matters was not excessive in view of evidence of adverse effect of suit on reputation, credit and business operations of partner so charged, and in showing of expenses incurred.

9. Fraudulent Conveyances

⇨296, 297, 298(1), 300(1)

In son's action to set aside allegedly fraudulent conveyances of father's property to prevent collection of judgments, evidence sustained finding that conveyances involved were executed at time son had valid claim for damages for malicious prosecution against father, that conveyances involved were intended to put father's assets beyond reach of creditors, that conveyances were without consideration and were fraudulent, and that conveyances would render father insolvent.

Newell & Chester and Robert M. Newell, Los Angeles, for appellants.

Milton A. Krug, Los Angeles, for respondent.

SCOTT, Justice pro tem.

Three actions consolidated for trial were decided in favor of plaintiff and from that judgment defendants appeal.

Following the example of all counsel, we shall refer to the parties by their respective first names. Defendants Walter and Rose were husband and wife. They are parents of plaintiff Murray and of Fanchon.

There has been prolonged and bitter litigation among these parties, see *Metzenbaum v. Metzenbaum*, 86 Cal.App.2d 750, 195 P.2d 492; *Metzenbaum v. Metzenbaum*, 96 Cal.App.2d 197, 214 P.2d 603; *Metzenbaum v. Metzenbaum*, 115 Cal.App.2d 395, 252 P.2d 31, 966; *Metzenbaum v. Metzenbaum*, 115 Cal.App.2d 771, 252 P.2d 1014.

Of the three actions now before us for consideration on appeal, the first was for malicious prosecution, being number 563226 in the Los Angeles Superior Court, *Murray, plaintiff, v. Walter and Fanchon, defendants* (no judgment therein being rendered against Fanchon). It was based on a suit which had been called the "trust case", previously brought in the same court, *Walter and Fanchon, plaintiffs, v. Murray and others, defendants*, number 528500. The judgment of the trial court in this "trust case" was affirmed on appeal, 86 Cal. App.2d 750, 195 P.2d 492.

The second action now before us was likewise for malicious prosecution, Murray, plaintiff, v. Walter and Rose, defendants, number 574203 in the trial court (no judgment therein being rendered against Rose). It was based on a suit which has been called the "partnership case" previously brought in the same court, Walter and Rose, plaintiffs, v. Murray and others, defendants, number 522631. The judgment of the trial court in this case was affirmed on appeal, 96 Cal.App.2d 197, 214 P.2d 603.

A separate appeal was taken by Murray from an order denying reimbursement to him as liquidating partner for attorney's fees. This order was reversed in part and affirmed in part, 115 Cal.App.2d 395, 252 P.2d 31, 966.

The third action now before us on this appeal is number 574204 in the trial court, Murray, plaintiff, v. Walter and Rose, defendants. It was an action to set aside an allegedly fraudulent conveyance of assets from Walter to Rose, by which Murray would be prevented from collecting his judgments in the two malicious prosecution cases.

Motion to dismiss the appeal of Walter from judgment covering the three cases now before us was made by Murray, and was denied, 115 Cal.App.2d 771, 252 P.2d 1014. Walter's appeal from judgment in favor of Murray in these three cases is now before us for determination.

The finding of the trial court as to the malicious prosecution based on the "trust case" included the following: that Walter (who is an attorney) and Fanchon filed suit against Murray and his bank alleging that Murray held a certain royalty in an oil lease in trust for Fanchon; that a complaint, an amended complaint and a second amended complaint were filed; that the bank as collecting and disbursing agent was enjoined from paying Murray the proceeds of the royalty; that the injunction was terminated by failure of Walter and Fanchon to justify the securities on the undertaking; that Walter and Fanchon had charged that Murray wrongfully and without authority had sold part of the royalty and pledged the balance; that Walter acted with malice and without probable

cause, that the allegations of the complaints and affidavits for injunction were false; that a demurrer to the second amended complaint was sustained and a judgment of dismissal thereafter entered. Having thus found that there was malice, want of probable cause and a termination favorable to Murray, the trial court found that he had sustained damages entitling him to an award of \$5,000 plus \$2,500 attorney's fees and \$2,500 exemplary damages.

[1,2] There was evidence, including a written agreement of Walter and Murray, that the oil lease royalty was an asset of a dissolved partnership composed of Walter and Murray, and that Walter claimed that at one time he had tried orally to convey to Fanchon one-half of the royalty without the consent of Murray and without regard to the rights of creditors of the partnership. The trial court was justified in its determination that as an attorney, Walter knew that he had no probable cause for filing his complaint and first and second amended complaints. As to matters of evidence which were in dispute, it was the province of the court, as trier of facts in the malicious prosecution cases, to determine whether or not such facts were shown as would warrant an inference of probable cause. The findings of fact in the case now under consideration, that were the basis for the trial court's determination that there was no probable cause are supported by substantial evidence in the record and hence will not be disturbed on appeal. *Singleton v. Singleton*, 68 Cal.App.2d 681, 691, 157 P.2d 886. The analysis by Justice Wilson of Walter's pleadings in the "trust case", as reported in 86 Cal.App.2d 750, 195 P.2d 492, clearly shows that the entire case was one intended solely to harass and damage Murray. Good faith on the part of Walter was entirely lacking and actual malice was present and motivated his filing of the spurious pleadings.

[3,4] The necessary elements of an action for malicious prosecution are: (1) a judicial proceeding favorably terminated; (2) lack of probable cause; and (3) malice. *Jaffe v. Stone*, 18 Cal.2d 146, 149, 114 P.2d 335, 135 A.L.R. 775. The burden is on one who seeks to recover damages for malicious

prosecution to prove the foregoing issues. *Hudson v. Zumwalt*, 64 Cal.App.2d 866, 149 P.2d 457; *Citizens State Bank v. Hoffman*, 44 Cal.App.2d 854, 857, 113 P.2d 221; *Lotts v. Whitworth*, 76 Cal.App.2d 601, 605, 173 P.2d 823.

Our supreme court in the year 1884, in the case of *Eastin v. Bank of Stockton*, 66 Cal. 123, 126, 4 P. 1106, 1108, asked “* * *”, whether in this state an action can be maintained for the malicious prosecution of a civil action in which no process other than the summons was issued”, and stated, 66 Cal. at page 127, 4 P. at page 1109, “* * * when the action is brought and prosecuted maliciously, and without reasonable or probable cause, the plaintiff asserts no claim in respect to which he had any right to invoke the aid of the law. In such cases the plaintiff, by an abuse of legal process, unjustly subjects the defendant to damages which are not fully compensated by the costs he recovers. The plaintiff, in such a case, has no legal or equitable right to claim that the rule of law which allows a suit to be brought and prosecuted in good faith without liability of the plaintiff to pay the defendant damages, except by way and to the extent of the taxable costs, if judgment be rendered in his favor, should extend to a case where the suit was maliciously prosecuted without probable cause. But where the damages sustained by the defendant in defending a suit maliciously prosecuted, without reasonable or probable cause, exceed the costs obtained by him, he has, and of right should have, a remedy by action in the case.” (See also, “Wrongful Civil Proceedings”, *Prosser on Torts*, page 885, et seq. Sec. 97; *Restatement, Torts*, Vol. 3, p. 440 et seq.; *Vesper v. Crane Co.*, 165 Cal. 36, 130 P. 876, L.R.A.1915A, 541; 20 S.C.Law Rev. 116.)

[5,6] “* * * want of probable cause in a civil proceeding exists when the circumstances are such as to satisfy a reasonable and prudent man that he had no ground for suing.” 54 C.J.S., *Malicious Prosecution*, § 22, p. 979. Walter could not take refuge behind an assertion that he acted on the advice of counsel, *Murdock v. Gerth*, 65 Cal.App.2d 170, 179, 150 P.2d 489, because he has had forty years experi-

ence as an attorney. From an examination of his pleadings and his brief on appeal in the “trust case” it clearly appears that he had no faith in the purported legal theory upon which he was proceeding. “Good faith is undoubtedly an element of probable cause in malicious prosecution cases”. *Franzen v. Shenk*, 192 Cal. 572, 578, 221 P. 932, 934.

A further indication of Walter’s continuing lack of good faith is found in the answers filed in the malicious prosecution case now before us. His own answer contains denials and but little more. Fanchon’s answer, however, signed by Walter as her attorney contains not only denials but matters attacking the character and conduct of Murray. Nowhere does Walter plead ignorance or ineptitude in seeking to excuse his conduct as attorney for Fanchon and acting as his own attorney.

[7] Evidence of damage attributable to the filing of the suit and securing the injunction was sufficient to support the award of compensatory damages, including the attorney’s fees and the proof justified the award of exemplary damages. See *Finney v. Lockhart*, 35 Cal.2d 161, 217 P.2d 19.

The finding of the trial court as to the malicious prosecution based on the “partnership case” included the following: That Walter and Rose, plaintiffs, filed a complaint and first and second amended complaints against Murray, defendant, claiming that a certain oil lease royalty belonging to the dissolved partnership of Walter and Murray actually belonged to Fanchon; and further claiming that the partnership assets included certain Culver City oil and gas royalties and leases and charging Murray with misconduct concerning them, when in fact they were not partnership assets but were Murray’s own property. Its further finding in the action based on the “partnership case” was that judgment was given to Murray (on his cross-complaint) clearing his title to the Culver City and some other property and establishing that certain other oil lease royalties under consideration were property of the dissolved partnership of Walter and Murray and that Murray was the liqui-

dating partner and that Walter was indebted to the dissolved partnership.

The litigation was not required to dissolve the partnership because the parties themselves had already dissolved it by written agreement. The claim of interest in the Culver City property by Walter was lacking in evidentiary support, and the assertion that a partnership asset had been transferred by him as a gift to Fanchon was similarly without merit. Justice McComb's evaluation of his appeal in the "partnership case" 96 Cal.App.2d 197, 214 P.2d 603, is consistent with the trial court's finding in the malicious prosecution case based thereon that Walter's acts in that case were done maliciously, without probable cause and with intent to injure and damage Murray.

In his verified second amended complaint in the "partnership case", filed June 20, 1947, Walter alleged "the said partnership exists to this day". The trial court found that it had been dissolved no later than November 5, 1944, and Walter on this appeal admits "there was sufficient evidence to establish that the original partnership had been dissolved". The obvious iniquity of the pleadings filed by Walter in the "partnership case" appears in his claim that a partnership existed which had long since been dissolved and claim to a partnership interest in extensive personally owned property of Murray which had never belonged to the partnership and in which Walter never had any legal or equitable interest. The decision of the trial court in favor of Murray on his cross-complaint merely reduced to judgment certain limited rights asserted by Walter under a later agreement with Murray. These were rights which the latter had not disputed, and Walter needed no law suit to obtain. It was only after Walter had brought the "partnership suit" that Murray had sought by his cross-complaint to have their rights judicially established and their affairs settled under judicial supervision.

If any doubt of Walter's malice toward Murray had existed in the mind of the trial judge in the malicious prosecution

cases it was promptly dispelled upon reading the intemperate and abusive language employed by the father, Walter, concerning Murray contained in answer to Murray's cross-complaint in the "partnership case". Its diversified calumny asserted matters outside of the issues, imputing to Murray dishonesty, disorder, ignorance, confusion and brawling.

[8] The award of damages which were of like amounts as in the malicious prosecution action, was a reasonable award and finds adequate basis in evidence of the adverse effect of the suit brought by Walter in the "partnership case" on the reputation, credit and business operations of Murray, and in the showing made as to expense incurred.

[9] The third case which was combined for trial with the two suits for malicious prosecution was an action by Murray to set aside a conveyance from Walter to Rose of his interest in various partnership assets. The court found that this purported conveyance was dated March 14, 1949, at a time when Murray had valid claims for damages, as later established in the judgments for malicious prosecution, and that Walter intended thereby to put his assets beyond the reach of creditors and that it was without consideration and was fraudulent, all with the full knowledge and consent of Rose, and that such conveyance would render Walter insolvent. The trial court thereupon gave judgment setting aside the conveyance insofar as it is necessary to liquidate Murray's claim against Walter in the amount of \$20,000, plus costs. Walter's explanation of this arrangement by which he sought to divest himself of all of his assets was that it was a property settlement agreement in a divorce case between him and his wife. The trial court properly held that such transfer so patently fraudulent could not serve to defeat the claim of Murray as creditor.

Judgment affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

121 Cal.App.2d 152

PATTERSON v. DAVIS.**Civ. 4802.**District Court of Appeal, Fourth District,
California.

Nov. 5, 1953.

Consolidated actions by putative wife against executrix of estate of her supposed husband, to set aside quitclaim deed to realty executed by plaintiff to deceased, and to recover reasonable value of services alleged to have been rendered by plaintiff to deceased. The Superior Court, Imperial County, Elmer W. Heald, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Griffin, J., held, inter alia, that there was no undue influence or fraud practiced upon plaintiff whereby she was induced to execute the instrument in question, and that plaintiff's failure to file claim for services in the estate precluded any action for reasonable value of such services.

Judgment affirmed.

1. Contracts ⇨99(1)

Assuming that a confidential relationship may exist under certain circumstances between parties living together as man and wife, although there is no valid marriage, the mere relationship alone, in a business transaction between them, will not taint it with suspicion of undue influence or fraud, and before presumption of undue influence or fraud may arise, facts must show that a confidential relationship existed and that such confidential relationship was violated and used to obtain an unfair advantage. Civ.Code, § 158.

2. Deeds ⇨196(2, 3)

When a husband secures a property advantage from his wife, burden is cast upon him to show that there has been no undue influence.

3. Appeal and Error ⇨1010(1)

Whether a spouse who gained a property advantage from the other spouse has overcome presumption of undue influence, is question for trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence.

4. Deeds ⇨211(3, 4)

In grantor's action to set aside a deed, evidence sustained finding that there was no undue influence or fraud practiced upon grantor, who was living with grantee as his wife at time of execution of deed, whereby grantor was induced to execute instrument in question.

5. Deeds ⇨196(3)

If there has been a full and fair disclosure to wife of all facts essential to her protection, and wife freely and voluntarily executed conveyance to husband, it is not essential in order to overcome presumption that husband exercised undue influence over wife that there be evidence that wife received independent legal advice.

6. Gifts ⇨49(4)

In grantor's action to set aside quitclaim deed given to grantee, with whom grantor was living as his wife although no valid marriage had been entered into, for purpose of enabling grantee to devise it by his will to his niece upon his death, evidence was sufficient to support conclusion that grantee intended making a gift of whatever interest she had in the realty involved to grantor for such purpose. Civ. Code, § 1040.

7. Deeds ⇨15

Where grantor executed quitclaim deed to realty voluntarily, with knowledge of its contents and with intent to convey realty to grantor for purpose of enabling grantor to devise it by will to his niece upon his death, no consideration was necessary. Civ.Code, § 1040.

8. Deeds ⇨211(2)

In grantor's action to set aside quitclaim deed to realty, executed in favor of grantee with whom grantor was living as his wife although no valid marriage had been entered into, evidence sustained finding that grantor did not execute the instrument under a mistake of fact.

9. Appeal and Error ⇨172(1)

Where grantor, in seeking to set aside deed, failed to plead mistake of fact in execution of instrument, such claim could not be relied on for first time on appeal.

10. Work and Labor ⇨26

Plaintiff who sought to recover reasonable value of services allegedly rendered to her supposed husband had burden of proving that services rendered were of greater value than benefits received.

11. Work and Labor ⇨28(1)

In action to recover for services allegedly rendered by plaintiff to her supposed husband, evidence sustained finding that insufficient proof had been presented on which to predicate any specific judgment, particularly in view of finding, supported by evidence, that plaintiff knew of illegality of her marriage from its inception.

12. Executors and Administrators ⇨431(2)

Where putative wife had filed no claim in estate of her supposed husband for domestic services alleged to have been rendered her supposed husband, wife could not maintain action to recover reasonable value of such alleged services. Probate Code, § 716.

James A. Gardner, Bakersfield, for appellant.

J. W. Fleming, Brawley, for respondent.

GRIFFIN, Justice.

Consolidated actions to set aside a deed and to recover for alleged services performed.

Jesse Patterson married his wife Callie in 1915. They took to live with them as their own child, defendant Rubie Lee Davis, Jesse's niece. In June, 1939, Jesse bought, on contract, a house and lot (the subject matter of this action) for \$300, payable \$10 per month. Title thereto was to be vested in Jesse and Callie's names. They moved into the house which consisted of one bedroom and two other smaller rooms.

In July, 1939, Callie left Brawley, where they had been living, and went to Arkansas on account of her health or for a visit. It appears from the evidence that plaintiff Carrie Patterson knew Jesse and his wife in Arkansas, and some question arose as to the extent of the friendship between Jesse and plaintiff at that time. After Callie left for Arkansas apparently Jesse

contacted plaintiff and she came to Brawley to live with him as his housekeeper or in some such capacity. The evidence is not too clear as to what knowledge plaintiff had as to Jesse's marital status at that time. She testified Jesse told her that he and his wife had broken up and he "had sent her home for keeps"; that when she came out here she knew "he wasn't free" to marry her because Jesse told her that; that she didn't know, as a fact, that Jesse and his wife were actually married when she knew them in Arkansas because she was not there at the time of the wedding. Plaintiff's counsel then stipulated that they were, in fact, married. Considerable evidence was offered indicating that plaintiff did know that at the time she was living with Jesse and at the time she married him, he had not been legally divorced. It affirmatively appears from the testimony that before plaintiff's marriage to Jesse she was living with him; that Jesse was a deacon in the colored church and some kind of an indignation meeting resulted in a visitation, wherein Jesse was asked as to his marital status and why he was living with plaintiff when he had not divorced his former wife, and that he was told to "straighten it out"; that plaintiff called one of the members of the church on the phone and stated to her that although she (plaintiff) was not there that night she had learned about such visitation and the complaint. One witness testified that she went to Arkansas with Callie because she was sick, and stayed there about a month, and when she returned Carrie was rooming with another lady, but about a month after that Carrie moved into Jesse's house and it was in April, 1940, that they had him up in the church for living with her while they were unmarried.

It appears that in December, 1939, Jesse brought an action against Callie for divorce. Service of summons was by publication. An interlocutory decree was not entered until December 20, 1940, and during the intervening time plaintiff lived in the home with Jesse.

It is plaintiff's testimony that after the entry of the interlocutory decree, Jesse represented to her that he had been di-

forced and was free to marry her; that she believed these representations and they were married on January 14, 1941, about 25 days after the entry of the interlocutory decree; that they lived together as husband and wife; that they both worked and contributed their earnings and personal labor to the household, and certain improvements were made to the property here in question.

On September 2, 1943, a final decree of divorce was entered, but it was dated nunc pro tunc as of January 8, 1942. Only the one ceremonial marriage took place between the parties. No valid marriage ever existed and counsel for plaintiff so stipulated at the trial. Plaintiff testified that she believed at the time of her marriage that Jesse had been legally divorced from Callie; that at the time Jesse obtained his final decree he brought the document to her and she inquired of him as to what that meant and whether or not they would have to be remarried, and he assured her they did not. She testified she was not familiar with the law and never saw a lawyer about it and did not learn until after Jesse's death, which occurred on April 2, 1950, that the marriage was invalid.

The parties lived together as husband and wife for more than nine years. Payments on the property here involved were completed in July, 1943, and title was vested in Jesse and Callie. Jesse and Carrie purchased another home adjoining this property and title was held in their names as joint tenants. It appears that Callie later returned to Brawley and found that Carrie and Jesse were living together as husband and wife; that Jesse obtained from her a quitclaim deed of her interest in the property here involved on consideration that Jesse would provide in his will for a disposition of that property to decedent's niece who they raised and to whom Jesse was financially and morally obligated.

On December 7, 1943, Jesse executed a grant deed of the property here involved to himself and plaintiff Carrie, as his wife, as joint tenants. On January 13, 1948, Carrie Patterson executed a quitclaim deed thereto to Jesse, reciting a consideration of \$10. This is the instrument plaintiff

seeks to cancel in this action on the ground of fraud and undue influence. On January 17, 1948, Jesse executed his will in which he devised to defendant Rubie Lee Davis the real property here in question, and for some reason devised therein the adjoining property held by himself and Carrie as joint tenants, to his "wife, Carrie Patterson". It appears that the quitclaim deed here in question and the will were prepared by an attorney and that both Jesse and Carrie were present in his office when their provisions were being discussed and that both parties appeared before a notary public where the quitclaim deed was acknowledged. Plaintiff claims she did not understand the nature of the transaction, that the will was not mentioned, and also claimed that the blanks in the quitclaim deed were not filled in when she signed it; that she did not understand that she was divesting herself of her interest in the property; that she was not familiar with the practices of the business world and did not have the benefit of independent legal advice.

As opposed to this claim, the attorney testified that in plaintiff's presence Jesse stated that he wanted to prepare a deed and a will; that he brought plaintiff with him because she had an interest in the matter; that he and his wife Carrie owned this property and that they had agreed that she would transfer her interest in it to him and he would leave a will by which he would devise the property to his niece because he was under obligation to her; that plaintiff participated in the conversation and approved the transfer and offered no objection; that subsequently the deed and will were executed and returned to him and the deed was then recorded; that in 1950, when he learned of Jesse's death, he wrote to plaintiff and Mrs. Davis notifying them of his possession of the will; that these ladies came to his office together and that they discussed the terms of the will and no objection was voiced by either; that plaintiff wanted to know the procedure necessary to obtain title to the house in which she then resided; that he advised her it would come to her under the terms of the joint tenancy deed and she

never made any claim to the property here in question.

Rubie Lee Davis testified that her uncle practically raised her; that he was unable to read or write; that Carrie attended to all business transactions for him; that she was in the home when Jesse and Carrie were living together as husband and wife in 1948; that Carrie said to her: "Rubie * * * I don't know whether he's (Jesse) told you or not, but I have signed off of the old place and he wants to will that to you * * *. We built a new home and that's mine because I don't want no part of the old place that belonged to he and Callie, and I have signed over that, and that is for you * * *"; and that he was going to will it to Rubie; that when they went to the attorney's office plaintiff had a copy of the will with her; that her uncle had previously shown it to her; that the attorney explained to plaintiff that under the will plaintiff would "get her house" and Rubie would "get" hers; and that plaintiff then raised no objection. Another witness testified that plaintiff told her she knew of the transaction involving the quitclaim deed and will; that she stated: "Yes, I know he willed it to her (Rubie) because I signed the paper * * * I signed it because I didn't have nothing to do with that lot, him and Callie bought that lot and that's why I signed * * *"

By plaintiff's first amended complaint in action No. 26490, in the first cause of action she seeks \$3,000 by way of damages for shock, humiliation and mental suffering by reason of the claimed false representations of Jesse Patterson to induce her to enter into an invalid marriage with him. In the second cause of action she claims she was by such false representations induced to live with Jesse and was, by reason of the invalidity of the marriage, deprived of her normal expectancy and property rights as a widow, to the value of \$3,000. In a third cause of action she alleges that by reason of his false representations, for a period of nine years she rendered services to Jesse as a companion, cook, and housekeeper, and that he promised to pay her the reasonable value thereof in the sum of \$3,300. It was admitted that plaintiff filed

no claim in his estate in reference to any of these causes of action. In action No. 26479, plaintiff seeks to set aside the quitclaim deed above mentioned.

The trial court found generally in favor of defendant and specifically found that about September, 1949, plaintiff and decedent, without participating in a marriage ceremony, commenced cohabiting, although at said date decedent was the legal spouse of Callie Patterson and this fact was known to plaintiff; that the marriage of decedent and Callie Patterson was not terminated by a final decree of divorce until January 8, 1942; that decedent was an ignorant and uneducated person who could neither read nor write, and he imposed great faith and confidence in plaintiff; that plaintiff was able to read and write and decedent left the transaction of a great deal of their business in the hands of plaintiff; that plaintiff had her own separate bank account and handled her own affairs; that during said marriage decedent did not exert influence or control over plaintiff and plaintiff at all times exercised her own free will in business matters; that the matter of conveying the interest of plaintiff in said real property to decedent had been agreed upon between plaintiff and decedent prior to their visit to the attorney; that plaintiff executed the quitclaim deed to decedent before a notary public who acknowledged the said execution; that plaintiff gave said deed with a full understanding of the nature and legal significance of her action; that it was fully disclosed to her and she comprehended that by the giving of said deed she would have no interest whatsoever in said real property; that the execution of said deed by the plaintiff was without the coercion, undue influence or fraud of the decedent; that plaintiff received no consideration from decedent by reason of her execution of said quitclaim deed; that plaintiff executed it without any false or fraudulent representations on the part of the decedent, and no representations were made to plaintiff by decedent with intent to deceive her, and she was not deceived; that it was not true that plaintiff was ignorant of the invalidity of her marriage to decedent until after his death; that it was not true that

between January 14, 1941, and May 2, 1950, or at any other time, plaintiff rendered and performed services as a companion or cook or housekeeper to decedent at his special instance or request or that decedent promised to pay to plaintiff the reasonable value of any services rendered by her to him; that plaintiff failed to file a creditor's claim in the probate proceedings in the estate of decedent and that all allegations set forth in plaintiff's amended complaints in these consolidated actions inconsistent with the findings of fact herein are untrue. The judgment was that plaintiff take nothing by these consolidated actions.

The well prepared but voluminous brief of counsel for plaintiff on appeal presents nine separate questions. (1) It is claimed that a fiduciary relationship was created between plaintiff and Jesse even though there was no valid marriage, citing such cases as *Holmes v. Holmes*, 98 Cal.App.2d 536, 220 P.2d 603; and *Fieg v. Gjurich*, 163 Cal. 740, 127 P. 49. (2) That accordingly, a presumption of fraud and undue influence arose and that inadequacy of consideration alone was sufficient to raise the presumption, citing such cases as *Brisson v. Brisson*, 90 Cal. 323, 27 P. 186; *Bacon v. Soule*, 19 Cal.App. 428, 126 P. 384; and *Sparks v. Sparks*, 101 Cal.App.2d 129, 225 P.2d 238. (3-4) That the evidence did not dispel or overcome the presumptions mentioned, citing such cases as *McKay v. McKay*, 184 Cal. 742, 195 P. 385; *Nobles v. Hutton*, 7 Cal.App. 14, 93 P. 289; *In re Estate of Miller*, 16 Cal.App.2d 141, 60 P.2d 492; *Smith v. Lombard*, 201 Cal. 518, 258 P. 55; and *Bank of America Nat. Trust & Savings Ass'n v. Crawford*, 69 Cal.App.2d 697, 160 P.2d 169. (5) That the evidence did not show any bad faith of plaintiff in marrying decedent. (6) That even though the original contract of purchase of the property was executed by decedent and his former wife, plaintiff still had an interest in the property. (7) That the evidence establishes, as a matter of law, that plaintiff executed the conveyance under a basic mistake of fact, believing she and decedent were husband and wife, and that she did not have independent advice, citing *Ross v. Conway*, 92 Cal. 632, 28 P. 735; *Herbert v. Lanker-*

shim, 9 Cal.2d 409, 71 P.2d 220; and other cases. (8) That she is entitled to restitution for her services which she performed and to hold otherwise would unjustly enrich defendant, citing *Lazzarevich v. Lazzarevich*, 88 Cal.App.2d 708, 200 P.2d 49. (9) That it was not necessary, under the facts in this case, to file a creditor's claim in the estate, citing such cases as *County of Los Angeles v. Security First National Bank*, 84 Cal.App.2d 575, 191 P.2d 78; and *Burdick v. Kerkovecz*, 81 Cal.App. 786, 254 P. 684.

[1] Considering points (1) to (5) inclusive, assuming that a confidential relationship may exist under certain circumstances between parties living together as man and wife, although there is no valid marriage, *Gatje v. Armstrong*, 145 Cal. 370, 78 P. 872, the mere relationship alone, in a business transaction between them, will not taint it with suspicion of undue influence or fraud. *Civ.Code*, Sec. 158; *McDougall v. McDougall*, 135 Cal. 316, 67 P. 778; *Donze v. Donze*, 88 Cal.App. 769, 264 P. 294; 6 Cal.Jur. 76, sec. 44. Before the presumption may arise the facts must first show that a confidential relationship did exist. Secondly, that that confidential relationship was violated and that the relationship was used to obtain an unfair advantage. *Dimond v. Sanderson*, 103 Cal. 97, 37 P. 189; 9 Cal.Jur. 236, sec. 111.

[2-4] Assuming that the evidence might support a finding of confidential relationship and that a presumption of undue influence or fraud might arise the main question here involved is whether or not the evidence presented was in conflict with this claimed presumption and that accordingly the trial court was justified in finding from the entire evidence that there was no undue influence or fraud practiced upon plaintiff whereby she was induced to execute the instrument in question. It is true, as plaintiff contends, that when a husband secures a property advantage over his wife the burden is cast upon him to show that there has been no undue influence. It is also true, however, that whether or not the spouse gaining such an advantage has overcome the presumption of undue influence

is a question for the trier of fact, whose decision will not be reversed on appeal if supported by substantial evidence. *Weil v. Weil*, 37 Cal.2d 770, 236 P.2d 159. We conclude that the evidence fully supports the finding of the trial court. *Kopner v. Fread*, 58 Cal.App.2d 114, 135 P.2d 634; *Combs v. Combs*, 75 Cal.App.2d 903, 171 P.2d 949; *Weil v. Weil*, supra.

[5] To overcome the presumption of fraud or undue influence it is not absolutely essential that there be evidence that the wife received independent legal advice if there has been a full and fair disclosure to her of all the facts essential to her protection, and she freely and voluntarily executes the conveyance. In re Estate of *Brimhall*, 62 Cal.App.2d 30, 143 P.2d 981; *Smith v. Lombard*, 201 Cal. 518, 258 P. 55; *Marsiglia v. Marsiglia*, 78 Cal.App.2d 701, 178 P.2d 478.

[6,7] Considering questions 6 and 7, if plaintiff had some interest in the real property involved the evidence would support a conclusion that she intended making a gift of it to her husband for the purpose of his devising it by will to his niece upon his death, *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691; Civ.Code, Sec. 1040; 9 Cal.Jur. p. 136, Sec. 38. Where such conveyance was executed voluntarily, with knowledge of its contents, and with intent to convey, no consideration was necessary under sec. 1040 of the Civil Code. *Lieman v. Golly*, 178 Cal. 544, 174 P. 33.

[8,9] The evidence as to whether plaintiff executed the instrument under a mistake of fact was conflicting, and fully supports the negative finding of the court in this respect. Accordingly, it may not be disturbed on appeal. *Chichester v. Seymour*, 28 Cal.App.2d 696, 83 P.2d 301. In addition, plaintiff failed to plead mistake of fact. Such claim may not now be relied on for the first time on appeal. *Quality Building & Securities Co. v. Bledsoe*, 125

Cal.App. 493, 14 P.2d 128; *Brandt v. Brandt*, 32 Cal.App.2d 99, 89 P.2d 171.

[10,11] Points 8 and 9 involve the claim for alleged services performed by plaintiff for decedent upon the allegations in the amended complaint that the decedent "then and there promised to pay plaintiff the reasonable value of such services". Just what services plaintiff performed for decedent is not clearly shown by the evidence nor is there any evidence as to the reasonable value thereof *over and above the value of the support and maintenance furnished her by her supposed husband*. The one rendering the services has the burden of proving that the services rendered are of greater value than the benefits received. *Sanguinetti v. Sanguinetti*, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342; *Lazzarevich v. Lazzarevich*, 88 Cal.App.2d 708, 200 P. 2d 49, and cases cited; *Partrick v. Partrick*, 112 Cal.App.2d 107, 245 P.2d 704. The court was justified in finding that no sufficient proof had been presented in this respect upon which to predicate any specific judgment, particularly where there was a finding supported by the evidence that plaintiff knew of the illegality of the marriage from its inception.

[12] The finding that it was first necessary to file a claim for such services in the estate under sec. 716 of the Probate Code before any action could be commenced thereon is supported by the cases of *Zaring v. Brown*, 41 Cal.App.2d 227, 106 P.2d 224; *Etchas v. Orena*, 127 Cal. 588, 60 P. 45; *See v. Joughin*, 18 Cal.App.2d 414, 64 P.2d 149; and *Reed v. Reed*, 178 Cal. 187, 172 P. 600.

The court's ultimate finding that plaintiff is not entitled to recover from defendant on any cause of action alleged is supported by the evidence.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

121 Cal.App.2d 95

GILLESPIE v. GILLESPIE.

Civ. 19666.

District Court of Appeal, Second District,
Division 3, California.

Nov. 4, 1953.

Divorce action by wife for extreme cruelty. The Superior Court of Los Angeles County, Raymond McIntosh, J., entered interlocutory decree of divorce and entered order denying defendant's motion for new trial and defendant appealed. The District Court of Appeal, Vallée, J., held that evidence sustained finding that defendant was guilty of extreme cruelty.

Appeal from order dismissed and judgment affirmed.

1. Divorce ⇨177

In action for divorce, trial court's order denying defendant's motion for new trial was nonappealable.

2. Divorce ⇨184(4)

In action for divorce, the District Court of Appeal can only consider the evidence most suitable to findings together with every inference reasonably to be drawn therefrom.

3. Divorce ⇨130

Where husband allegedly struck his wife, made disparaging remarks about her in presence of other persons, told her to leave the house, and moved another woman into house with him, evidence supported decree granting wife divorce on ground of extreme cruelty.

4. Divorce ⇨147

In divorce actions for extreme cruelty whether there has been wrongful infliction of grievous mental suffering is question of fact to be deduced from all circumstances in case, keeping in mind intelligence, refinement and delicacy of sentiment of complaining party.

5. Divorce ⇨184(10)

In divorce action, finding based on any reasonable analysis of evidence will not be disturbed on appeal.

Cal.Rep. 261-262 P.2d—35

6. Divorce ⇨146

Where court, in action for divorce, received testimony subject to motion to strike if not connected, and subsequently testimony was stricken on defendant's motion, admission of testimony was not improper.

Hardwick & English, and Edward S. Hardwick, Los Angeles, for appellant.

Harry B. Seelig and Arthur J. Manley, Los Angeles, for respondent.

VALLÉE, Justice.

[1] Appeal by defendant from an interlocutory decree of divorce. He also appeals from an order denying his motion for a new trial. Since the latter order is nonappealable the appeal therefrom will be dismissed. The court found that defendant had been guilty of extreme cruelty toward plaintiff, without justification or provocation. Defendant asserts the finding is unsupported by the evidence.

The parties were married in New York in 1942. Defendant came to California in 1945; plaintiff, in 1946. They separated on January 23, 1952. Plaintiff testified she left defendant because he told her she was no longer needed, she could get her clothes and go; he asked her to leave, and made life so miserable for her she could no longer stay. On several occasions he threatened to strike her. On one occasion in 1950, he struck her with his hand on the side of the head and on the forehead, bruising it; she tried to get out of the house; he grabbed her by the arm, threw her back from the door and down onto a settee where he held her. As a result she had a "terrible headache" for several days afterwards. On one occasion, defendant closed and locked the house in which the parties were living, in an attempt to keep plaintiff out. On one occasion, in the presence of another person, defendant told her that she was "a nasty type of woman"; on another, also in the presence of a third person, that she was "a nasty old hag, nasty, dirty old hag." The fact that defendant made these statements to plaintiff was corroborated. On

another occasion he told her she was "nothing but a lowdown type of woman, * * just a loafer." He told others in the presence of plaintiff that she did not have any sense, that she was crazy. Shortly before the separation defendant told plaintiff he had given her time to make up her mind about getting out. When she did not leave, he did not speak to or notice her, "just went about his business," until she left about a week later. Plaintiff testified she did not want to leave; she left because she had to, because defendant told her to go. A few months after plaintiff left the house a woman and her two daughters moved into it and remained there for several months. Defendant was living at the house during this time. On one occasion during this period, defendant, the woman and her daughters left the house in an automobile on a Saturday morning and did not return until Sunday evening. Plaintiff knew the woman and her daughters were living in the house and that defendant was also living there at the time. The evidence as to what occurred after plaintiff left the house was corroborated.

Plaintiff testified that defendant's treatment caused her to become very nervous, she lived under a nervous tension and strain; it affected her eating, her food did not digest, it would not stay down; she "got to the place" where she could not sleep because of her heart; she "was just about near a nervous breakdown," and she lived in fear of defendant.

[2-5] An inference of extreme cruelty is fairly deducible from the evidence. We can only consider the evidence most favorable to the findings together with every inference reasonably to be drawn therefrom. As Mr. Justice McComb stated in *Marson v. Rand*, 107 Cal.App.2d 466, 468, 237 P.2d 18, 20: "It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled." Whether in any given case there has been the wrongful in-

fliction of grievous mental suffering is a question of fact to be deduced from all the circumstances in the particular case, keeping always in mind the intelligence, refinement, and delicacy of sentiment of the complaining party; and the finding of the trial court, based on any reasonable analysis of the facts and circumstances as shown by the evidence, will not be disturbed on appeal. *Walker v. Walker*, 108 Cal.App.2d 605, 607, 239 P.2d 106.

[6] Defendant claims the court erred in permitting a witness to testify over objection that during the time she lived with the parties defendant grabbed her and asked her several times to go out with him. The evidence was received subject to a motion to strike if not connected. At a later stage of the trial the evidence was stricken on motion of defendant. Obviously there was no error.

The appeal from the order is dismissed. The judgment is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



121 Cal.App.2d 116

WILLIAMS v. McHUGH.

District Court of Appeal, Third District,
California.

Nov. 4, 1953.

Action against executor on rejected claim for reasonable value of personal services alleged to have been performed by plaintiff for testatrix pursuant to oral agreement that in compensation therefor testatrix would devise to plaintiff property consisting of small residence. The Superior Court, San Joaquin County, George F. Buck, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to support findings that decedent had promised to compensate

plaintiff for services rendered, and that reasonable value of services could be recovered.

Judgment affirmed.

1. Executors and Administrators ⇨221(7)

In action for services performed for testatrix pursuant to alleged oral agreement that plaintiff would be compensated by will, evidence was sufficient to support findings that plaintiff worked continually for testatrix on strength of testatrix' oral promise to compensate by will.

2. Executors and Administrators ⇨221(5)

In action for domestic services rendered pursuant to alleged oral agreement by testatrix to compensate plaintiff by will, in view of fact that kind of services rendered were sufficiently shown, and services were of class as to value of which much common knowledge was possessed, court could fix reasonable value at \$25 per week without aid of expert opinion.

3. Limitation of Actions ⇨46(5)

In action for continuous personal services rendered pursuant to alleged oral agreement by testatrix to compensate plaintiff by will, statute of limitations did not commence to run until termination of services on death of testatrix.

James I. Harkins, Stockton, for appellant.

Ralph Kingston, Stockton, for respondent.

VAN DYKE, Presiding Justice.

Respondent brought action against the appellant as executor of the will of Mary Kipling Farrington on a rejected claim for the reasonable value of personal services alleged to have been performed by her for the testatrix pursuant to an oral agreement that in compensation therefor the testatrix would devise to her by will property consisting of a small residence. The complaint alleged the foregoing and that the services had been rendered as agreed, but decedent had failed to carry out her part of the contract.

The case was tried to the court sitting without a jury and judgment was rendered in favor of plaintiff in the sum of \$5,850, payable from decedent's estate in due course of administration. The appeal is from this judgment and for reversal appellant claims insufficiency of the evidence and error in disallowing his defense of the statute of limitations as to any services rendered more than two years immediately preceding the death of the testatrix.

Decedent owned three houses in Stockton, California, one of which was next door to her home in which she lived alone. Respondent moved into this house and occupied it for about five years before the death of the testatrix, paying cash rental therefor at all times. Respondent and her husband were not permitted to testify as to facts and circumstances occurring prior to the death of decedent and respondent was thus compelled to rely upon testimony of persons not parties to the action. There was testimony of neighbors and friends that from 1946 until her death decedent suffered intermittent illnesses, was, generally speaking, in poor health, was occasionally bedridden, and that during the period from that date until her death they saw respondent performing errands and household tasks for decedent, including preparation of food and the performance of services, usually done by domestic help. Their observations were made on visits in varying degrees of frequency and while they observed the respondent performing services they were, of course, unable to testify that her services were continuous. As to the agreement to compensate respondent in the manner alleged, there was ample evidence. Witnesses testified to repeated declarations by decedent made to them that she was going to leave the respondent the house in which she was living in order to compensate her for the services she was rendering and that the decedent was not paying her as the services were rendered. One witness stated that decedent said over and over again that she was not paying the respondent as the services were rendered, but would leave her the house for that purpose.

[1] We think the foregoing sufficient to support the trial court's findings that the allegations of the complaint were true. It was admitted, of course, that the decedent had made no provision whatever in her will for respondent. Respondent was under no legal or moral duty to render any services whatsoever to her landlady since she paid cash rental for the house she occupied and it is a fair inference from the facts testified to that the services were of such nature as are not generally rendered upon any basis other than that of expected compensation. It is true that no witness was able to testify that respondent's services were continuously performed each and every day, but their visits were frequent and all of them saw respondent working about the home of decedent, doing the things usually done by domestic help in response to an evident need of decedent for such service. The requisite continuity of service to meet the allegations of the complaint could fairly be inferred from the testimony received.

The general rule governing actions of this sort is well stated in *Wainwright Trust Co. v. Kinder*, 69 Ind.App. 88, 120 N.E. 419, 420:

"* * * The intention to pay and the expectation of compensation may be inferred from conduct where equity and justice require compensation, * * * the elements of intention to pay on the one hand, and expectation of compensation on the other, must be found to exist; but such elements, * * *, may be inferred from the relation and situation of the parties, the nature and character of the services rendered, and any other facts or circumstances which may reasonably be said to throw any light upon the question at issue."

See, also, *Moore v. Spremo*, 72 Cal.App. 2d 324, 330-331, 164 P.2d 540, and *Toney v. Security First Nat. Bank*, 108 Cal.App. 2d 161, 167, 238 P.2d 645, 648, from which we quote the following:

"In an action of this character to recover for services rendered, the vital elements of the cause of action are: the services performed, an oral promise to compensate

by will, the failure to perform the promise, the reasonable value of the services, and failure to pay. *Leoni v. Delany*, 83 Cal.App.2d 303, 309, 188 P.2d 765, 189 P.2d 517."

All of these elements were proved or admitted, the proof being sufficient to justify the inferences drawn by the trial court in favor of the respondent.

[2] No one testified as to the reasonable value of the services shown to have been rendered by respondent. The time of rendition of services ran through 234 weeks and the trial court found that the reasonable value of the services was \$25 per week, making a total of \$5,850. Since the kind of services rendered was sufficiently shown and the services were of a class as to the value of which much common knowledge is possessed, the case is one which falls within the general rule that, under such circumstances, the trier of fact may fix the reasonable value without the aid of expert opinion. *Nylund v. Madsen*, 94 Cal.App. 441, 271 P. 374.

[3] Appellant's contentions that the statute of limitations would serve to bar all or a large part of respondent's claim is sufficiently answered by the cases of *Long v. Rumsey*, 12 Cal.2d 334, 84 P.2d 146; *Winder v. Winder*, 18 Cal.2d 123, 127, 114 P.2d 347, 144 A.L.R. 935, and *Leoni v. Delany*, 83 Cal.App.2d 303, 307, 188 P.2d 765, 189 P.2d 517. Said the court in *Winder v. Winder*, supra, 18 Cal.2d at page 127, 114 P.2d at page 350:

"It is the settled law of this state that when continuous personal services are performed under an express agreement for compensation upon termination thereof, which agreement is unenforceable because not in writing (§ 1624, Civ.Code; § 1973, Code Civ.Proc.), the reasonable value of the services may be recovered, and that the statute of limitations does not commence to run until the termination of the services, which, in such cases, is usually upon the death of the promisor."

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

PEOPLE v. JENNINGS.

Cr. 2466.

District Court of Appeal, Third District,
California.

Nov. 4, 1953.

Hearing Denied Dec. 3, 1953.

Prosecution for the possession of a weapon by inmate of state prison. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was sufficient to sustain finding that defendant had knowledge that a knife was hidden in his boot.

Affirmed.

1. Convicts ☞5

Evidence was sufficient to warrant defendant's conviction for the possession of a weapon while an inmate of state prison in that defendant had knowledge of the fact that a knife was hidden in his boot. Pen.Code, § 4502.

2. Convicts ☞5

Under statute absolutely prohibiting all prisoners in state prison, without qualification, from possessing or carrying on their persons certain designated deadly weapons, the proof of the possession of the prohibited weapon warrants inference that weapon is carried in violation of the statute. Pen. Code, § 4502.

3. Criminal Law ☞1167(2)

Where defendant, who was a prisoner in state prison, was charged on two counts with possession of knives, one of which was found in defendant's boot and the other of which was found in the hollow leg of defendant's bunk, defendant was not prejudiced by the joinder of the two counts, since defendant made no request to be tried separately on each count, and since, even if he had made such request, the court would have been well within its discretion in denying the request. Pen.Code, §§ 954, 4502.

4. Criminal Law ☞696(4)

In prosecution for possession of weapon by inmate of state prison, objection by prosecution to testimony of defendant by

statement "I am going to move to strike all this testimony", which was sustained by the court, referred only to defendant's clearly inadmissible testimony which had immediately preceded the objection, and did not refer to defendant's earlier testimony which was clearly admissible.

Richard F. Desmond, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

This appeal is taken from a judgment based upon a jury verdict convicting the appellant of the offense of violating Section 4502 of the Penal Code which prohibits possession of a weapon by an inmate of a state prison. Appellant had been committed to the State Prison at Folsom for receiving stolen property. On November 24, 1952, and while holding a position as a trusty he was engaged in work without the prison walls. On that day when he had finished work and after changing into prison garb he was admitted through the gate into the prison proper. As he entered the yard a guard noticed an object protruding from the rear of his boot. When appellant, on command, removed his boot it was found to contain a knife wrapped in tape and lying along the inner sole of the boot. Thereafter his cell was searched, and, although the first search revealed nothing, a repeated search on the following day revealed another knife concealed in a hollow leg of the prisoner's bunk. Thereafter he was charged by information with two counts of violation of said code section. He refused the assistance of counsel at his trial, although the assistant public defender, who had been appointed to defend him, remained at the counsel table to render such assistance as might be necessary. Appellant was acquitted of the count which involved possession of the knife found in the leg of his bunk. He was convicted of possession of the knife found in his boot.

For reversal of the judgment appealed from appellant asserts: 1. That though he was admittedly in possession of the knife

in his boot, yet the evidence was insufficient to show that he had knowledge of such possession; 2. That he was unlawfully prejudiced in the trial of the first count by the joinder of the second count therewith and the concurrent trial as to both. Although appellant had refused the aid of counsel at his trial he did request that counsel be appointed to assist him on his appeal and counsel was so appointed. At the argument an additional point for reversal was urged in that it was claimed that the court erroneously struck out material testimony given by defendant as a witness in his own behalf.

[1,2] The evidence was sufficient to support appellant's conviction. As to the element of knowledge the jury were entitled to conclude from the admitted fact that the knife wrapped in tape was lying along the inner sole of the appellant's boot as he walked into the yard that he could not but have known of the presence in his boot of so large and so rigid an object. His contention was that he had been imbibing too freely of a drug he possessed and which he said he was using to relieve a sinus infection and that the effect of the drug, compounded and enhanced by a like overindulgence in intoxicating liquor, had rendered him unable to appreciate the presence of the knife in his boot. He produced witnesses who testified that his condition was that of a man who had little awareness of what was going on, but there were other witnesses who testified that he appeared to be quite sober and in the full possession of his normal faculties. The issue of knowledge was one of fact which the jury determined against him and that determination is obviously supported by sufficient evidence to make it binding on appeal. The code section involved absolutely prohibits all prisoners in any state prison, without qualification, from possessing or carrying upon their persons certain designated deadly weapons and proof of the possession of the prohibited weapon warrants the inference it was carried in violation of the statute. *People v. Wells*, 68 Cal.App.2d 476, 156 P.2d 979. See, also, *People v. Patterson*, 102 Cal.App.2d 675, 228 P.2d 51; *Peo-*

ple v. Gory, 28 Cal.2d 450, 170 P.2d 433, and *People v. Marcus*, 120 Cal.App.2d 347, 260 P.2d 1051.

[3] As to the second point raised, to-wit, the prejudice appellant contends he suffered through the joining of the second count with the first, the answer is that such joinder is specifically authorized by Penal Code Section 954, which permits an information to charge two or more different offenses of the same class and leaves it to the discretion of the trial judge to order them to be tried separately for good cause shown. The record does not show that such a request was made and if it had been, and, being made, had been denied, it is obvious from what has been said that the court would have been acting well within the bounds of discretion in declaring such denial.

[4] The final contention advanced on oral argument is based upon the following record: When the prosecution had concluded its case in chief and in the course of presenting his defense the defendant had taken the stand, he was asked by the assistant public defender as to his status in the case as defendant and as to his being an inmate of Folsom Prison. He was then asked to tell the jury what had happened on the days when the knives had been discovered. He proceeded to relate where he had been working and on what work he had been engaged before he had returned to the prison yard. He related his use of the drug and the extent of that use and told the jury that he had been drinking and that he had taken too much of the drug as well as too much of the drink. He said he remembered little of what happened when he came through the gate. He told how the prisoners leaving the yard for the day's work outside the walls threw their prison garb in a pile on the floor of a shack used for making the change and how they changed back into them before going into the yard again. He said that evidently he had gotten hold of the wrong boots and that while he could not deny that there may have been something in one of them yet he denied that he knew there was a knife in it. He then stated that he had been in Folsom for

PETERSON v. PETERSON.

Clv. 15555.

District Court of Appeal, First District,
Division 1, California.

Nov. 3, 1953.

five years and that as of the time of trial had exactly 39 days before he would be entitled to be discharged as a free man. All of the foregoing was admitted without objection. He then added that he had received a letter about four days before the trial telling him that his father was dying. At that point the following occurred: The Prosecutor: "I am going to move to strike all this testimony. The Court: You object to that? [The Prosecutor]: Yes. The Court: All right, objection sustained." He now contends that the court actually struck from the record all of the testimony he had given prior to the objection having been made. We do not think this is a fair analysis of the record. We think it is clear enough that the only part to which the objection was made and to which the order was directed was the statement concerning the letter he said he had received four days before, telling him that his father was dying. Clearly this matter was inadmissible and it is equally clear that the matter which preceded it was all admissible. It was not until he spoke of the letter that the prosecutor moved to strike. The record does show, to be sure, that the motion to strike was directed to "all this testimony", but we think it would be unreasonable to interpret the record so literally. What we have said is substantiated when we turn to the argument which the appellant made to the jury and in which he referred to the testimony he had given, and which he now says was stricken, and based his argument on it. No objection was made that he was discussing matters outside the record. Furthermore, the jury was instructed upon the issue of knowledge and the court told the jury that they must not convict unless, among other things, they were convinced that he knew beyond a reasonable doubt that he had the knife. When the whole record is considered, every one, including the appellant, must have understood that the court's order was directed only to the matter concerning the letter.

The judgment and the order appealed from are affirmed.

PEEK and SCHOTTKY, JJ., concur.

Paternity proceeding. The Superior Court, County of Marin, Jordan L. Martinnelli, J., entered judgment on verdict for alleged father and child appealed. The District Court of Appeal, Peters, P. J., held that permitting questions addressed to child's mother which were not directed to specific acts of claimed misconduct of mother but were aimed at developing fact that for five years prior to conception the mother had been in society where men outnumbered women by substantial majority was not prejudicial error in view of fact that on direct examination of mother, child's counsel brought out that the mother had been in the WACs for three years and then had been a civilian employee of the government in Europe for over two years thereafter.

Judgment affirmed.

1. Bastards ⚡59

In paternity proceeding, evidence of immorality of the mother prior to period of possible conception, or questions designed to bring out or imply acts of immorality for purpose of showing bad character, or for impeachment, are inadmissible.

2. Bastards ⚡92

In paternity proceeding, permitting questions addressed to mother of child by alleged father's counsel which were not directed to specific acts of claimed misconduct of mother but which were aimed at developing fact that for five years prior to conception the mother had been in a society where men outnumbered women by substantial majority was not prejudicial in view of fact that on direct examination child's counsel brought out that mother had been in the WACs for three years and then had been a civilian employee of the government in Europe for over two years thereafter.

3. Bastards ⇨69

In paternity proceeding, testimony of alleged father as to admissions made to him by mother, that she had had a love affair with an American in Germany, that she had been "intimate" with this man and that she had seen him shortly before her embarkation to the United States and that she believed her child had been conceived in Germany was properly admitted as impeachment, particularly in absence of objection, even though it might have been hearsay so far as child was concerned. Code Civ.Proc. §§ 2044, 2066.

4. Bastards ⇨73

Where notice of motion for new trial was deposited in mail, properly addressed, on March 13th, motion was filed March 14th, on March 20th stipulation was filed which was approved by court and incorporated in an order, extending time to file affidavits to April 4th, but affidavits were not filed until April 14th, affidavits were filed too late and trial court was justified in disregarding them. Code Civ.Proc. § 659a.

5. Bastards ⇨73

Affidavit which was filed in paternity proceeding in connection with motion for new trial and in which juror averred that it was her belief and that of other jurors, evidenced by jury room discussion, that alleged father had had intercourse with mother of child, but that affiant and others were not satisfied that alleged father was father of the child could not be used to impeach, explain, or interpret verdict for alleged father, except to show that it was arrived at by chance and affidavit was not inconsistent with verdict.

6. Bastards ⇨73

In paternity proceeding, refusal to grant new trial on basis of affidavits to effect that alleged father had attempted to adopt child, which would have been admissible to impeach alleged father who at trial had denied that he had ever offered to adopt child, was not abuse of discretion, in view of fact that mother knew of evidence in affidavits many months before trial and no reason was alleged as to why evidence was not produced at trial and in view of fact that such conduct would not necessarily

amount to an admission. Code Civ.Proc. § 2055.

7. New Trial ⇨105

Newly discovered impeaching testimony does not compel granting of a new trial.

8. Witnesses ⇨287(1)

Evidence that could not have been admitted on direct examination may be admissible on re-direct to rebut evidence produced on cross-examination.

9. Bastards ⇨92

In paternity proceeding, refusal to allow mother of child to testify as to real reason action had been brought by child through mother, after being asked on cross-examination by alleged father if action had been brought in belief that alleged father was wealthy was not prejudicial error, in view of fact that mother emphatically denied that hope of financial gain motivated bringing of action.

10. Evidence ⇨290

Declarations of pedigree by those in the family group are generally admissible to prove facts of family history but if a controversy or a motive to deceive exists when such declarations are made, they are then inadmissible and are self serving hearsay.

11. Bastards ⇨92

In paternity proceeding, refusal to allow mother on direct examination to testify that at birth she had child christened with name of alleged father was not prejudicial error, in view of testimony of mother that she had never had intercourse during her life with any one but alleged father and that jury knew child's name because it appeared in complaint along with name of alleged father.

Myrick & Deering and Scott, San Francisco, for appellant.

Bagshaw, Schall & Martinelli, A. E. Bagshaw, San Rafael, for respondent.

PETERS, Presiding Justice.

This action was instituted by a child through his mother, Anne Kinney, against

defendant to have it determined that defendant is the father of plaintiff, and to secure support, counsel fees and costs. At the trial the only witnesses produced were defendant and plaintiff's mother. The jury brought in a verdict for defendant. From the judgment entered on that verdict plaintiff appeals.

The child was born July 26, 1948. The complaint was not filed until July 10, 1951. The cause was tried in March, 1952. The evidence was directly conflicting. Anne testified to meeting respondent on an army transport upon her return to this country from Germany; that upon his promise to get a divorce and to marry her she spent two nights, October 17 and 18, 1947, in two designated hotels in New York City with respondent; that she had sexual intercourse with him on those occasions; that she was then 32 years of age; that prior and subsequent to those two nights she had never had intercourse with any other man; that just before embarking on the transport she had her regular menstrual period.

Respondent, who had been married for ten years at the time of trial, denied these accusations. He admitted meeting Anne on the transport; denied any romantic overtures while on shipboard; admitted that he took Anne to dinner twice in New York but differed from Anne as to the dates, he claiming the two dates were October 16, and 17, 1947. He admitted that, on October 17th, after both had had considerable to drink, he propositioned Anne to spend the night with him at a hotel, and she agreed, but claimed that they were unable to find a hotel that was not full, and so he returned her to her hotel, where men were not admitted, without having accomplished his purpose, and returned to the ship where he was employed. He denied that then, or at any other time, he had had intercourse with Anne.

Anne testified that defendant had registered the first night at Hotel Walcott, and the second night she, at defendant's suggestion, had registered as "Mr. and Mrs. A. Kinney" at the Breslin Hotel. Letters from both hotels were admitted in evidence. The Breslin's records failed to show that a

Kinney or a Peterson had registered there on any of the critical nights. The Walcott's records showed a "Mr. and Mrs. A. Peterson and party" had registered on October 15, 1947, and had checked out on October 17, 1947. No other record was found of a Kinney or Peterson registration for the nights in question.

It is not necessary to recount the evidence on these matters in further detail. It is obvious that on the critical issue of whether respondent had intercourse with Anne in October of 1947 there was a direct conflict. The burden rested on appellant to prove his case by a preponderance of the evidence. It was the jury's function to pass on the credibility of the two witnesses. It obviously was not convinced by Anne's story. Moreover, no contention is made that the evidence does not support the verdict and judgment.

The major contention of appellant is that error of a most prejudicial nature was committed on the cross-examination of Anne, in that respondent was then permitted to bring out her general relationships with other men over a period of about six years, and long prior to the period of possible conception. This, it is contended, was prejudicial error even though appellant's counsel at the trial (new counsel have been secured to handle this appeal) made no objection of any kind to the testimony in question.

On this issue the record shows the following: On direct examination by counsel for plaintiff Anne testified that she had been in the Women's Army Corps for three years, and had worked overseas as a civilian for about two years; that she was in Europe, either in the military service or as a civilian, from 1945 to September or October, 1947; that she met respondent on shipboard, and that it was upon their arrival in New York that the events above mentioned occurred. She also, on direct, testified that she never had had intercourse with any other man before or subsequent to October of 1947.

On the cross-examination of Anne respondent elaborated on these matters first brought out on direct. Not one objection was made to this cross-examination. Thus,

Anne testified that she was 32 in October of 1947; that she had been born in a small town in Alabama; that after the death of her father she lived for about a year in Birmingham, Alabama, with her sister; that both joined the service in 1941, her sister as a nurse, and she as a WAC; that she spent three years in the WACs, mostly in this country, but a short time in France and Germany. Respondent's counsel had her describe the various military establishments where she had been stationed. She testified that she had spent 2½ years at Mitchell Field, New York, as an aircraft dispatcher; that in these various camps she frequently saw and came in contact with many men, and was under the command of male personnel. It was brought out that Mitchell Field was close to New York City, but she denied making frequent visits to the metropolitan area. She then testified that she was sent overseas and spent several months in France and Germany; that in August of 1945 her enlistment expired, and she elected to stay in Germany on a civilian job; that she lived at Hertz, Germany, near Frankfurt; that she was so employed until September of 1947, when she returned to the United States; that during her stay at Hertz she first lived in an apartment and later in a commandeered house. She admitted that during this period she was in constant contact with male civilian and military personnel. It was brought out that Anne frequently ate and danced with military and civilian personnel, but she denied any steady romances with any particular individual.

In his argument to the jury counsel for respondent, without objection, was permitted to refer to the above evidence and to argue that it indicated Anne's lack of moral home ties during the five plus years she was in government service, and that this background rendered it highly unlikely that she would suddenly surrender her virtue at age 32, but rather indicated that she had lived a life where many men had the opportunity of being the father of the child.

[1] It is urged that this line of questioning and argument was undertaken for

the sole purpose of besmirching Anne's reputation and prejudicing her before the jury, and constituted serious and prejudicial error. It is undoubtedly the law that, in such actions, evidence of immorality of the mother prior to the period of possible conception, or questions designed to bring out or imply acts of immorality for the purpose of showing bad character, or for impeachment, are inadmissible, and that it is error to even ask such questions. *People v. Crandall*, 125 Cal. 129, 57 P. 785; *In re Estate of Kasson*, 127 Cal. 496, 59 P. 950; *In re Estate of Gird*, 157 Cal. 534, 108 P. 499; *Mensing v. Croter*, 209 Cal. 318, 287 P. 336, 280 P. 1026; *Dastagir v. Dastagir*, 109 Cal.App.2d 809, 241 P.2d 656, see annotation 104 A.L.R. 84. But there are authorities which hold that the trial court may permit questions about general background which, while incidentally or inferentially degrading, may serve to test the credibility and memory of a witness. *People v. Le Baron*, 92 Cal.App. 550, 268 P. 651, 269 P. 476; *People v. Clarke*, 130 Cal. 642, 63 P. 138; *People v. Frank*, 129 Cal.App. 119, 18 P.2d 719; *People v. Loomis*, 86 Cal.App. 768, 261 P. 512; *People v. Peccole*, 92 Cal.App. 470, 268 P. 473; *People v. Payton*, 36 Cal.App.2d 41, 96 P.2d 991.

[2] The principal case relied upon by appellant is *Dastagir v. Dastagir*, 109 Cal. App.2d 809, 241 P.2d 656. That case not only held that the asking of such questions was error, but also held that such error was prejudicial even though, as here, there had been no objection to such questions. Undoubtedly the *Dastagir* case contains much language in support of appellant. That case was also a paternity suit. There, as here, the respondent testified that he had not had intercourse with the appellant's mother. The jury, as here, brought in a verdict for the defendant. The judgment, based on that verdict, was reversed, for several reasons. One ground of the reversal was the asking of appellant's mother a series of questions broadly implying misconduct on her part at a time before the possible conception of the child. These questions were directed at specific in-

stances of misconduct, that is, they asked the witness if at a certain time and place she had engaged in described acts with designated individuals. The answer was consistently "No." No attempt was otherwise made to prove this implied misconduct. The appellate court held such questions highly improper, not only as implying information not actually possessed by counsel, but as improper for impeachment purposes, even if such information was possessed. The court stated the rule as follows, 109 Cal.App.2d page 815, 241 P.2d page 661: "The only question at issue was whether the defendant was or was not the father of the child born September 12, 1948. Any evidence offered to show directly or by inference that the plaintiff had sexual relations with some man other than the defendant prior to the date the child must have been conceived in due course of nature was therefore irrelevant and immaterial to prove or disprove the issue. Such evidence submitted to a jury might well inculcate a belief that the defendant was telling the truth, and not the plaintiff, and that therefore the defendant was not the father of the child. The plaintiff was entitled to have the credibility of her testimony judged by proper and not improper testimony or inferences resulting therefrom."

The court went on to hold that a failure to object to the suggestive and improper questions was not fatal to the contention that prejudice resulted, because it would create as much prejudice in the eyes of the jury to object to such questions as to allow them to pass. After citing sections 2044 and 2066 of the Code of Civil Procedure, it was held that the trial court should have objected to such questions of its own motion, and failure to do so deprived the plaintiff of a fair trial.

It should also be mentioned that several other errors not here relevant were involved in the Dastagir case, errors which entered into the reversal.

It is our opinion that the holding in the Dastagir case is not here controlling. This is so for several reasons. Here the questions addressed to appellant's mother were

not directed to specific acts of claimed misconduct. They were aimed at developing the fact that for the five years prior to conception the witness had been in society where men outnumbered women by a substantial majority. The implication, of course, was obvious. But this subject matter was not brought into the case first by respondent. On direct examination appellant's counsel brought out that the witness had been in the WACs for three years, and then been a civilian employee of the government in Europe for over two years thereafter. The questions asked by respondent were not directed to specific claimed acts of misconduct, but merely elaborated on the subject first brought into the case on direct. Appellant cannot elect to take advantage of the implications flowing from the fact that his mother had enlisted in the WACs at the inception of the war, and was therefore a patriotic American, without subjecting the witness to cross-examination as to this general subject matter.

[3] Moreover, these general questions about the background of the witness were not mere shots in the dark unconnected up with admissible evidence. The respondent testified as to admissions made by Anne to him that she had had a love affair with an American in Germany, that she had been "intimate" with this man, and that she had seen him shortly before her embarkation to the United States. These admissions were made in New York, and later in San Francisco after the baby was conceived, the plaintiff's mother then stating, according to respondent, that she believed the child had been conceived in Germany. While statements of the mother as to her belief as to who was the father of the child may be hearsay so far as the child is concerned, In re Estate of Gird, 157 Cal. 534, 108 P. 499, such statements may be admissible as impeachment, and are clearly admissible in the absence of objection.

[4] Appellant next contends that the contents of several affidavits filed on the motion for a new trial compelled the granting of the motion. The motion for a new trial was filed March 14, 1952, specifying most of the grounds permitted by law, and

recited that affidavits were to be filed to support several of the grounds urged. On March 20, 1952, a stipulation was filed which was approved by the court, and incorporated in an order, extending the time to file the affidavits to April 4, 1952. No affidavits were filed until April 14th. Thus, not only were the provisions of the order and stipulation violated, but also violated were the provisions of section 659a of the Code of Civil Procedure. That section requires the filing of affidavits within ten days of service of the notice of motion (the notice of motion was deposited in the mail properly addressed on March 13th), and empowers the court to extend the time for not more than twenty days. Thus, no matter how the time is computed, the affidavits were filed too late. Thus, the trial court was justified in disregarding all of the affidavits. *Fernandez v. Consolidated Fisheries, Inc.*, 117 Cal.App.2d 254, 263, 255 P.2d 863; *Sitkei v. Frimel*, 85 Cal.App.2d 335, 338, 192 P.2d 820.

[5] Moreover, even if considered, none of the affidavits required the granting of the motion. One of the major affidavits relied upon is that of one of the jurors. It was properly disregarded by the trial court because that juror averred that it was her belief and that of the other jurors, evidenced by the jury room discussion, that respondent had had intercourse with Anne, but the affiant and the others were not satisfied that respondent was the father. Such an affidavit cannot be used to impeach, explain, or interpret the verdict, except to show that it was arrived at by chance. *Fernandez v. Consolidated Fisheries, Inc.*, 117 Cal.App.2d 254, 263, 255 P.2d 863; *Phipps v. Patterson*, 27 Cal.App.2d 545, 546, 81 P.2d 437; *Mish v. Brockus*, 97 Cal.App.2d 770, 776, 218 P.2d 849. Moreover, neither this affidavit nor any of the others filed is inconsistent with the verdict.

[6, 7] It is also urged that a new trial should have been granted based on certain affidavits, also filed late, which, it is claimed, show that respondent committed perjury in reference to a matter that must have affected the judgment. This conten-

tion is based on the following facts: When respondent was being cross-examined under section 2055 of the Code of Civil Procedure he was asked if he had ever offered to adopt the child or whether he had ever sent any one to talk to appellant's mother about an adoption. Respondent replied that he had not. On the direct examination of his own counsel respondent also denied that Anne had ever asked him to adopt the child, that he had ever written to her refusing to adopt the child, and that he could not recall any suggestion that he adopt the child. He admitted that in July, 1951, after receiving a letter from Anne demanding support money, he had sent his friend Michaelson to talk with Anne about her claims, but denied that he had authorized his friend to talk about adoption. During the trial appellant offered no other evidence on this subject, and made no effort to challenge or to impeach this testimony. In her affidavit on the motion for a new trial Anne alleged that prior to August of 1951, which was more than six months prior to trial, respondent and his attorney in the Marin County courthouse offered to adopt the child. This affiant also alleged that in July, 1951, one Michaelson, claiming to represent respondent, met with her to discuss adoption and offered her, on behalf of respondent, a "limited financial adjustment," which she refused, and that she then told Michaelson that there would be no adoption by respondent.

A Mrs. McCarthy, by affidavit, averred that as the intermediary of Anne she met with Michaelson about July 3, 1951, and that Michaelson, on behalf of respondent, stated that respondent offered to adopt the child and to pay to Anne \$1,000 in cash.

Respondent's counsel filed a counter-affidavit in which he averred that respondent was then out of the country as a naval officer; that he, the attorney, after seeing the child and prior to trial, had suggested to respondent that, regardless of the subject of paternity, since respondent and his wife were childless, they should consider the possibility of adopting the child; that respondent stated that he and his wife might be interested; that then in the cor-

ridor of the courthouse in Marin County he, the attorney, approached Anne, and suggested that respondent and his wife might adopt the child; that Anne refused the offer; that to the knowledge of affiant this was the only offer of adoption made by respondent; that affiant did not know of Michaelson or of his authority to act for respondent.

It is claimed that these affidavits demonstrate that respondent must have committed perjury on the trial when he denied any offers to adopt, and that under such circumstances it was an abuse of discretion to deny the motion for a new trial. It will be first noted that these affidavits disclose that the evidence there set forth was known to Anne many months before the trial, and no reason is alleged as to why such evidence was not produced at the trial. Moreover, such conduct would not necessarily amount to an admission. The proffered testimony would have been admissible, however, to impeach defendant. But the law is well settled that newly-discovered impeaching testimony does not compel the granting of a new trial. See *Wilson v. Kopp*, 114 Cal.App.2d 198, 206, 250 P.2d 166.

[8,9] Appellant next contends that the redirect examination of Anne was unduly limited in that, although defendant had been permitted to ask her on cross-examination if the action had been brought in the belief that respondent was wealthy, she had been prohibited on redirect from testifying as to the real reason the action had been brought. It is undoubtedly the law that evidence that could not have been admitted on direct examination may be admissible on redirect to rebut evidence produced on cross-examination. *Kahn v. Maryland Casualty Co.*, 63 Cal.App. 189, 218 P. 452; *People v. Corey*, 8 Cal.App. 720, 97 P. 907. It is probably true that the redirect of Anne was unduly restricted on this collateral matter. But this error could not possibly have been prejudicial. Anne emphatically denied that hope of financial gain by her had motivated the bringing of the action, and it must have been obvious to

all that the action was brought to secure support for the child.

[10] The last contention that need be mentioned is that the trial court improperly excluded evidence claimed to be admissible under the pedigree exception to the hearsay rule. This contention is predicated upon the fact that on the direct examination of Anne she was prevented from testifying that at birth she had the appellant christened "Clifford Anthony Peterson." Later on cross-examination she testified that she had not told respondent that she intended to name the child after him until some time after the child had been so christened.

It is of course true that declarations of pedigree by those in the family group are generally admissible to prove facts of family history. But there are limitations on this exception to the hearsay rule. If a controversy or a motive to deceive exists when such declarations are made they are then inadmissible. They are then self-serving hearsay. *Wigmore, Evidence*, Vol. V, pp. 298-302, §§ 1483 and 1484; see, generally, *In re Estate of Walden*, 166 Cal. 446, 137 P. 35; *In re Jessup*, 81 Cal. 408, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594.

[11] We do not find it necessary to pass on the question as to whether this evidence was admissible or inadmissible. Even if admissible it would only have tended to show that when the child was born his mother claimed or believed that respondent was the father. That fact was already before the jury, particularly by the testimony of Anne that she never had intercourse during her life with any one but respondent. It is also obvious that the jury knew that the child was named Clifford Anthony Peterson because the complaint so names the appellant, and also names Clifford A. Peterson as defendant. Thus, even if such evidence should have been admitted, its exclusion could not have been prejudicial.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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CALHOUN v. DAVIS et al

Civ. 19520.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1953.

Rehearing Denied Nov. 30, 1953.

Hearing Denied Dec. 30, 1953.

Common count for money had and received, to recover money which defendant had obtained from plaintiff through fraud in connection with assignment to plaintiff of a distributor-dealer franchise for certain automobile allegedly to be produced. The Superior Court of Los Angeles County, Clarence L. Kincaid, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, McComb, J., held that where money was obtained by false and fraudulent representations, and plaintiff had not received anything of value from the defendant, it was unnecessary that plaintiff give defendant further notice of rescission than by instituting the action.

Affirmed.

1. Money Received ⇨8

Where one person obtains money from another by false and fraudulent representations, an action under the common count for money had and received will lie to recover such sum.

2. Money Received ⇨11

Where money is obtained by false and fraudulent representations, and plaintiff has not received anything of value from defendant, it is unnecessary to rescind the contract other than to institute an action to recover the consideration which plaintiff has paid.

3. Appeal and Error ⇨173(12)

An objection on appeal that notice of rescission of a contract was not given will not be considered where it was not raised in the trial court, but such objection will deem to have been waived.

4. Appeal and Error ⇨422

Where defendant appealed on a partial transcript only, and notice of appeal did not specifically set forth as a ground therefor any alleged error of trial court in including in judgment a certain sum

expended by plaintiff as result of fraudulent representations of defendant, defendant had waived his right to urge such contention on appeal. Rules on Appeals, rule 4(b).

5. Appeal and Error ⇨175

Where a trial is held upon the theory by all the parties that certain issues are before the trial court, a party will not be heard to urge for the first time upon appeal that such issues were not properly before the trial court.

6. Fraud ⇨35

Where plaintiff, as result of false and fraudulent representations of defendant, paid defendant a sum of money for distributor-dealer franchise for certain automobile, obtaining by plaintiff of defendant's approval of a dealer franchise did not amount to a waiver of defendant's fraud, when plaintiff was not at that time aware of the fraud, and defendant reiterated his misstatements and fraudulent representations, and plaintiff acted promptly upon discovering the fraud.

7. Estoppel ⇨110

Waiver is an affirmative defense which must be set up in answer of a defendant relying thereon, and defendant who failed to plead that plaintiff had waived a fraud perpetrated upon him, thereby forfeited his right to urge such waiver.

8. Appeal and Error ⇨1010(1)

The question of waiver is one of fact for the trial court, and its determination, supported by substantial evidence, is binding upon appellate court.

Simpson & Wise, Hall & Kent, Long Beach, for respondent.

Morris Lavine, Los Angeles, for appellant.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover money which defendant Gary Davis, hereinafter referred to as defendant, obtained by fraud from plaintiff, defendant appeals.

Facts: In October and November, 1948, defendant and his agent, Leonard B. Kinister, made false representations to plaintiff by reason of which plaintiff was induced to enter into a contract with defendant, dated November 23, 1948, whereby in consideration of plaintiff's agreement to pay defendant \$55,000, \$10,000 of which was paid forthwith, plaintiff was assigned a distributor-dealer franchise for the sale of the Davis Car in King County, State of Washington, and the Territory of Alaska. The false representations were: (1) the Davis car would be sold f. o. b. factory Van Nuys, California, for the price of \$995 per car; (2) mass production would commence on January 1, 1949, or shortly thereafter in quantities of 150 cars per day; (3) defendant had received about one million dollars in cash from franchise holders and an additional sum of approximately \$250,000 would be forthcoming from the sale of franchises and these sums of money would be entirely sufficient to finance production of the car to the extent of 150 cars per day; (4) defendant had a plant expansion fund in cash of \$100,000 which was being held as a reserve account for the purpose of expanding the plant at the time production commenced; (5) many of the employees of defendant were working for nothing because of their great interest in the car and they hoped to be paid later when the car was in production, but that in no event did the salary of any employee, including defendant, exceed \$50.00 per week; (6) the sale of franchises was limited to dealers in the Pacific coast states and because of this limitation of dealerships three quarters of a car per day would be available; and (7) the necessary jigs and dies for production of the car in quantities of 150 cars per day would be ready by January 1, 1949.

After the contract of November 23, 1948 was entered into, plaintiff sold several distributor franchises which were approved by defendant as required by his agreement with defendant. At the end of March, 1949, plaintiff became suspicious that defendant had misrepresented the facts to him and came to Long Beach for a conference with defendant.

On March 24, 1949, plaintiff received through the mail from Mr. Kinister a dealer franchise which had been sold by Kinister to Thornton-Weaver two days before. Plaintiff had no prior knowledge of this sale, and the proceeds thereof were deposited by Mr. Kinister to plaintiff's bank account in Seattle.

The afternoon of April 2, 1949, plaintiff had a three hour conference with defendant during which plaintiff requested the return of the money which he had invested, whereupon defendant assured plaintiff that everything was all right and they were going into production as he had represented; that the potentialities of the utility or military vehicle which defendant expected to manufacture would "put the company on the road to good business." Thus being reassured, plaintiff obtained defendant's approval of the assignment to him of the franchise to Thornton-Weaver.

Thereafter, upon learning that the representations set forth above were in fact false and fraudulent and that defendant had reiterated the fraud and misstatements in his conference with plaintiff on April 2, 1949, plaintiff, on April 5, 1949, instituted the present action in the form of a common count for money had and received to recover the money he had paid defendant. Having found that all the statements of defendant were untrue and were made for the purpose of cheating plaintiff, the court entered judgment for the sums paid by reason of such representations, to wit, \$26,757.-67.

The foregoing facts are disclosed by the record and are not questioned by defendant.

These are the propositions urged by defendant which it is necessary for us to determine:

First: *The common count for money had and received did not lie to recover the money which defendant had obtained from plaintiff through fraud.*

[1] This proposition is untenable. It is settled that where one person obtains money from another by false and fraudulent representations, an action under the common count for money had and received will lie

to recover such sums. (*Long v. Harrison*, 113 Cal.App. 321, 324 [3], 298 P. 148.)

Second: *Plaintiff could not maintain his action because he had not rescinded the contract which he entered into with defendant.*

[2] This proposition is likewise devoid of merit for two reasons: (1) It is the law that where money is obtained by false and fraudulent representations and the plaintiff has not received anything of value from the defendant, it is unnecessary to rescind the contract other than to institute an action to recover the consideration which plaintiff has paid. (*Philpott v. Superior Court*, 1 Cal.2d 512, 525, 36 P.2d 635, 95 A.L.R. 990; *Cherry v. Hayden*, 100 Cal.App.2d 416, 420 [7], 223 P.2d 878.)

In the present case the evidence discloses that plaintiff received nothing of value from defendant. Therefore there was nothing for him to restore to defendant and it was unnecessary for him to give defendant further notice of rescission than by instituting the action.

[3] (2) An objection on appeal that notice of rescission of a contract was not given will not be considered where it was not raised in the trial court. (*Cherry v. Hayden*, supra, 100 Cal.App.2d 416, 420 [6], 223 P.2d 878.)

In the instant case the record fails to disclose that defendant presented this objection to the trial court, therefore it will be deemed to have been waived under the foregoing rule.

Third: *The trial court erred in crediting plaintiff with the sum of \$8,157.67 for expenditures by him in the promotion and development of the Davis motor car.*

[4] This proposition is devoid of merit for two reasons: (1) Defendant has appealed on a partial transcript only and in his notice of appeal did not specifically set forth as a ground therefor any alleged error of the trial court in including in the judgment the \$8,157.67. He has therefore waived his right to urge this contention on appeal since rule 4(b), Rules on Appeal, reads in part: "If the appellant, in his notice to the clerk, states the points to be

raised by him on the appeal, he may designate the portions of the oral proceedings to be transcribed, or direct the omission of any portions which he deems unnecessary, and in such event shall be precluded from presenting any ground for reversal not embraced within the points stated by him, * * *." (Italics added.) (36 Cal.2d 3 et seq.)

The foregoing rule is here applicable.

[5] (2) The present case was tried upon the assumption that there was an issue as to the propriety of the inclusion in the judgment of sums expended by plaintiff in the development and promotion of the Davis car. Where a trial is held upon the theory by all the parties that certain issues are before the trial court, upon appeal a party will not be heard for the first time to urge that such issues were not properly before the trial court. (*McClure v. Donovan*, 33 Cal.2d 717, 731 [12], 205 P.2d 17; *Grimes v. Nicholson*, 71 Cal.App. 2d 538, 543 [7], 162 P.2d 934.)

Fourth: *Plaintiff was barred from maintaining his action for the reason that after discovering defendant's fraud, plaintiff waived it by obtaining defendant's approval of the Thornton-Weaver franchise.*

[6] This final proposition is also devoid of merit for three reasons: (1) The record discloses that plaintiff did not obtain defendant's approval of the Thornton-Weaver contract after learning of the fraud which had been perpetrated upon him, but that on April 2, 1949, the date of the approval of the Thornton-Weaver dealership agreement, defendant reiterated the misstatements and fraudulent representations which he had previously made to plaintiff, and it was only after such misrepresentations were repeated that he continued to recognize his contract with defendant by obtaining the latter's approval. When plaintiff discovered the fraud and misrepresentations which defendant had made to him on April 2, 1949, he instituted the present action.

[7] (2) Defendant has forfeited his right to urge that plaintiff waived the fraud perpetrated upon him for the reason that waiver is an affirmative defense and a defendant relying thereon must set it up in

his answer. (Wood v. Jotham Bixby Company, 29 Cal.App.2d 294, 299 [4], 84 P.2d 204; Williams v. Marshall, 37 Cal.2d 445, 456 [10], 235 P.2d 372.)

In the instant case defendant failed to plead waiver as an affirmative defense.

[8] (3) The question of waiver is one of fact for the trial court whose determination supported by substantial evidence, as in the present case, is binding upon an appellate court and will not be disturbed upon appeal. (French v. Freeman, 191 Cal. 579, 590 [11], 217 P. 515.)

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.



COLE et al. v. RUSH et al.*
Civ. 19832.

District Court of Appeal, Second District,
Division 2, California.
Nov. 6, 1953.

Hearing Granted Dec. 30, 1953.

Action for wrongful death brought against defendants in whose saloon decedent became intoxicated and challenged another patron to a fight, during course of which decedent was struck and fell to pavement striking his head, as result of which decedent died. The Superior Court of Los Angeles County, Philbrick McCoy, J., entered a judgment in favor of defendant and plaintiffs appealed. The District Court of Appeal, McComb, J., held that allegations of complaint did not state a cause of action against defendants.

Affirmed.

Moore, P. J., dissented.

See also 40 Cal.2d 178, 252 P.2d 1.

1. Intoxicating Liquors — 291

In absence of statutory provision serving of alcoholic beverage to a patron of
* Subsequent opinion 271 P.2d 47.

saloon in an obviously intoxicated condition is not proximate cause of injury subsequently received by him because of intoxication.

2. Intoxicating Liquors — 306

Allegations of complaint that plaintiff's decedent was well known by defendants to be of quiet demeanor when sober and to be belligerent, quarrelsome and pugnacious when intoxicated, and that plaintiff had frequently asked defendants not to sell decedent enough liquor to intoxicate decedent, that decedent visited defendants' saloon and became intoxicated from liquor he bought while there, and that decedent challenged another patron to a fight and struck his head on pavement when he fell from a blow, and that decedent died as result, did not state a cause of action against defendants for death.

John C. Stevenson and Lionel Richman,
Los Angeles, for appellants.

Parker, Stanbury, Reese & McGee, John
Henry Peckham, Los Angeles, for respondents.

McCOMB, Justice.

Plaintiffs appeal from a judgment in favor of defendants predicated upon the sustaining of their general demurrer to the amended complaint without leave to amend, in an action to recover for wrongful death.

Facts: The pleading alleges:

Plaintiffs are the widow and children of James Bernard Cole, deceased; October 13, 1950, decedent visited a saloon known as the Tropic Isle owned and operated by defendants; at the time he entered the bar he was sober, but while there he purchased quantities of intoxicating liquor which he consumed resulting in his becoming intoxicated; decedent was well known to defendants who knew that when he was sober he was of a quiet demeanor, but when he was intoxicated he became belligerent, quarrelsome and pugnacious; plaintiff Dorothea Cole had on numerous occasions asked defendants not to sell her husband sufficient liquor so that he would become intoxicated.

It was also alleged that after decedent became intoxicated on October 13, 1950, he challenged a patron of the bar, Franklin Leonard, to a fight and in the altercation that followed decedent was struck by Leonard and fell to the pavement striking his head as a result of which he died.

Question: Did the amended complaint fail to state a cause of action for negligence against defendants in selling decedent intoxicating liquor, as a result of which he became intoxicated, engaged in a fight and received injuries from which he died?

[1,2] *Yes.* In the absence of a statutory provision the serving of alcoholic beverage to a patron in an obviously intoxicated condition is not the proximate cause of an injury subsequently received by him because of his intoxication. (*Hitson v. Dwyer*, 61 Cal.App.2d 803, 806[3a] et seq., 143 P.2d 952; *Fleckner v. Dionne*, 94 Cal. App.2d 246, 248[1], 210 P.2d 530.) In each of the foregoing cases a petition for a hearing was denied by the Supreme Court; hence we are bound by the rule announced in such decisions.

Since the facts in the instant case fall squarely within the foregoing rule the trial court properly sustained the general demurrer without leave to amend.

There is an additional reason which compels an affirmance of the decision of the trial court. In the complaint it is alleged that after decedent became intoxicated he challenged a patron of the bar, Franklin Leonard, to a fight and that in the altercation which followed, decedent was struck by Leonard causing him to fall to the pavement, striking his head, as a result of which he died. Clearly, the proximate cause of decedent's death was not his intoxication but the blow he received from Leonard which caused him to strike his head, resulting in his death.

In view of the decisions of the appellate courts of our own state, *Peck v. Gerber*, 154 Or. 126, 59 P.2d 675, 106 A.L.R. 996; *Mastad v. Swedish Brethren*, 83 Minn. 40, 85 N.W. 913, 53 L.R.A. 803; *Molloy v. Coletti*, 114 Misc. 177, 186 N.Y.S. 730, and *Cur-*

ran v. Olson, 88 Minn. 307, 92 N.W. 1124, 60 L.R.A. 733 are not here applicable. (*Schneider v. Schneider*, 82 Cal.App.2d 860, 862[2], 187 P.2d 459.)

Affirmed.

FOX, J., concurs.

MOORE, Presiding Justice.

I dissent. The authorities relied upon by respondent, *Fleckner v. Dionne*, 94 Cal. App.2d 246, 210 P.2d 530, and *Hitson v. Dwyer*, 61 Cal.App.2d 803, 143 P.2d 952, 953, are not controlling in this action. In the *Fleckner* complaint it is alleged that the proprietor of the saloon sold and served the minor *Dionne* intoxicating liquors while he was already drunk knowing that his automobile was nearby and that he would thereafter drive it and that such conduct was a negligent disregard of rights of plaintiffs. In the *Hitson* complaint, it is alleged that "while [he] was obviously intoxicated and sitting on a movable stool at defendants' bar he wrongfully was served intoxicating liquor, and as a result he fell from said stool to the floor"; he was dragged by defendants from his position on the floor; "as a result of said fall or the dragging, or both, plaintiff suffered a fracture, and other injuries". Both cases allege no more than negligence in serving liquors which the courts held was too remote to be actionable. In the action at bar, the pleading charges that prior to the date of decedent's injuries "and on occasions too numerous to name, plaintiff *Dorothea Cole*, requested defendants and each of them not to give, sell or furnish intoxicating beverages to *James Bernard Cole* sufficient to allow him to become intoxicated" but that defendants refused to desist from selling *James* intoxicating beverages; prior to *James'* coming to the saloon on the day he was injured he was not intoxicated by reason of the use of alcoholic beverages; at their saloon defendants gave, sold and furnished to *James Cole* alcoholic beverages which he drank until he was intoxicated; by reason of such intoxication from the alcoholic beverages, *James* became quarrelsome, belligerent and pugnacious;

quarreled with one Leonard who struck Cole; the latter then fell to the pavement resulting in his death.

Moreover, it was also alleged that defendants had specific knowledge, derived from decedent's numerous prior visits to the saloon, that he habitually became intoxicated and while in this state was invariably rendered belligerent and quarrelsome. Such definite knowledge of Cole's character must have given defendants reason to foresee such harm as resulted from his use of alcohol at the time in question. The fact that other events contributed to assure his death does not erase or minimize the evil of respondent's service of alcohol to decedent. It is these allegations of express knowledge on the part of defendants that serve to distinguish the case presented from the Fleckner and Hitson decisions.

If decedent had been allergic to sodium chloride and Mrs. Cole had notified defendants of such fact and if in disregard of such notice they had sprinkled salt on the eatable they served to Mr. Cole, and as a result he had died would they still be free from liability for causing his death? I see no such magic attached to the word "alcohol" as to make those who engage in the sale of it stand above the plane of ordinary mortals. Dealing in poison may be good cause for all men to beware, but it should place upon the dealer the responsibility for serving it to a person whom the dealer knows will probably cause injury to others or death or injury to himself while under the alcoholic influence. Alcohol has from time immemorial been under the ban of the law and is allowed upon the counter of the merchant or on the bar of a saloon solely by license. Because he is licensed to sell it does not exempt the vendor from the duty he owes to every member of the public: not to place it in the hands of a person he knows to be irresponsible and who while under its influence may do incalculable mischief.

The argument of Mr. Justice Dooling's dissent, *Fleckner v. Dionne*, supra, is apropos with additional cause for reliance upon it.

IN re SINCLAIR'S ESTATE.

KANE v. MYERS.

Civ. 4733.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1953.

Proceedings on a petition by executor for confirmation of sale of personal property for \$88,350. At the confirmation hearing the court inquired whether any one desired to increase amount of return bid by at least five per cent, and a party offered to increase bid to \$90,000. The Superior Court of San Bernardino County, R. Bruce Findlay, J., refused to accept the new offer, and entered order confirming the sale and offeror appealed. The District Court of Appeal, Barnard, P. J., held that the lower court could not accept the new offer unless written offer of 10 per cent more than amount named in return was received.

Order affirmed.

Executors and Administrators — 375

Where personal property was sold by executor for \$88,350, and at confirmation hearing a new offer of \$90,000 was made, court properly refused to accept the offer, in absence of written offer of 10 per cent more than amount named in return. Probate Code §§ 750 et seq., 755, 756, 756.5.

Samuel A. Miller, Los Angeles, for appellant.

Robert Ritchie, Fontana, Curtis, Knauf, Henry & Farrell, San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order confirming sale of personal property, presented on a settled statement.

The property sold consisted of a note and trust deed. At the time of confirmation a balance of \$95,000 remained unpaid, being payable over the next 19 years. In his return and petition for confirmation the executor reported that he had sold the note and trust deed to a Mrs. Boyle for \$88,350;

that he had given the required notice and the sale was legally made and fairly conducted; that this was the highest and best bid received and was not disproportionate to the value of the property; and that it was for the best interest of the estate that the property be sold, for the reason that liquidation was necessary in order to make distribution under the terms of the will.

At the hearing, the court inquired whether anyone present desired to increase the amount of the returned bid by at least 5%. The appellant Kane, through his attorney, stated that while he did not wish to increase the bid by 5% he was willing to increase the bid to \$90,000. He thereupon filed with the clerk a written bid offering \$90,000 for the note and trust deed. After a discussion with respect to the right of the court to consider an increased bid which was less than that provided for in section 756.5 of the Probate Code, the court expressed a desire to accept a higher bid if he could legally do so, and continued the hearing for a week. At that time the matter was further argued and the court stated that he did not wish to take the responsibility of rejecting the bid of Mrs. Boyle and ordering a new sale, as there was no assurance that the \$90,000 bid would then be made available. Thereupon, the attorney for the appellant stated that he had in his possession a cashier's check for \$10,000 which he was willing to deposit with the court or with the attorney for the executor, as evidence of good faith. Both the court and the attorney for the executor declined to accept the responsibility of accepting and holding the check. The executor then testified that he had written two letters to Kane telling him that the trust deed was for sale; that he had discussed the matter with Kane on several occasions but could not pin him down to a definite figure; that Kane tried unsuccessfully to find out what other bid had been received; that he later sent Kane a bid form but received no answer; and that no definite offer of any amount was made by Kane. Appellant's counsel then stated that if Kane were present he would testify that he had offered \$90,000 for this note and trust deed. The court then confirmed the sale to Mrs.

Boyle. In his order the court found that due notice of the hearing had been regularly given; that notice of the sale had been given by the executor as required by law; that the sale was regularly held at the time and place specified in the notice; that the sale was legally made and fairly conducted; that at said sale the executor sold this note and trust deed to Mrs. Boyle for \$88,350, this being the highest and best bid made; that the sum so bid is not disproportionate to the value of the property; and that an offer of at least 10% more than the bid was not made in open court.

No complaint is made with respect to the legality of the sale as returned to the court, or that the bid accepted was disproportionate to the value of the property under the circumstances. Appellant's sole contention is that under section 756.5 of the Probate Code it is mandatory for the court to accept any increased bid, even though the increase is less than 10%, provided it is substantial in amount. So far as material here, that section reads: "Upon the hearing of a petition for confirmation or approval of sale of personal property, * * * if a written offer of 10 per cent more in amount than named in the return is made * * * it is in the discretion of the court to accept such offer and confirm or approve the sale * * * or order a new sale."

The appellant argues that under the terms of this section the only discretion given the court is to accept the bid or to order a new sale in the event an increased offer of 10% is received; that if the increased bid is less than 10% greater than the returned bid the court has no discretion but must accept it, as being for the best interest of the estate; and that it was an abuse of discretion to refuse to accept his offer at the hearing.

In support of this contention the appellant cites *Jerrue v. Superior Court*, 7 Cal. App. 717, 95 P. 906, where the probate court originally accepted a bid only \$25 higher than the \$7000 bid covered by the return, and the case of *In re Estate of Depew*, 65 Cal.App.2d 81, 149 P.2d 890, 893, in which the court referred to the fact that in certain cases "section 756.5 provides means for the acceptance of a higher bid in the discre-

tion of the court." The Jerrue case involved only the question as to whether the original bidder was entitled to a writ of certiorari under certain facts not material here. Not only was it decided long before section 756.5 of the Probate Code was adopted, but it did not hold that the acceptance of the slightly increased bid was proper, even at that time. In *Re Estate of Depew*, it was merely held that title passed without confirmation, the sale having been had under section 770 of the Probate Code.

In connection with the sale of real property it has long been the law in this state that the court shall make an order confirming the sale, unless an increased bid of at least 10% (or 5%) is made at the hearing. This provision, now found in section 785 of the Probate Code, is based upon prior statutes long in force. In *Re Estate of Leonis*, 138 Cal. 194, 71 P. 171, it was held that it was incumbent upon one attacking a confirmation of sale to show, among other things, that a sale exceeding such bid by at least 10% could be obtained. In *Benallack v. Richards*, 125 Cal. 427, 58 P. 65, it was held that the investigation by the court is limited to ascertaining certain facts required by the statute, including whether or not an increased bid of at least 10% could be obtained, and that in the absence of facts showing a violation of the statute the court must make an order confirming the sale. In *Re Estate of Robinson*, 142 Cal. 152, 75 P. 777, it was held that it was the duty of the court to confirm a sale to the original bidder although another bidder offered \$600 more, but refused to offer 10% more, than the original bid.

Section 756.5 is included in an article of the Probate Code entitled "Sales in General". Section 755 provides that, with certain exceptions, all sales of "property" must be reported to and confirmed by the court before title passes. Section 756 provides for the filing of written objections to such confirmation and a hearing thereon. In section 756.5, which follows, no discretion is given to the court unless a written offer of 10% more than the amount named in the return is received. In that event the court may either accept the increased offer or order a new sale. The language used implies that

the court may not accept a new offer, or order a new sale, unless there is a compliance with the named condition. We find nothing in that section which supports the contention here made.

No good reason appears why the appellant should not have made his bid at the proper time. There are valid reasons, long recognized, for putting a condition on bidding at confirmation hearings. To permit a bidder to wait until he knew the amount of the bid accepted and returned, and to then bid a few dollars more, would make the prior proceedings largely worthless and would put an unnecessary burden on the court. For the protection of all concerned, a reasonable condition has been imposed by the legislature.

The order is affirmed.

GRIFFIN and MUSSELL, JJ., concur.



121 Cal.App.2d 136

McALINDEN v. NELSON.

Civ. 19778.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1953.

Action to recover real estate broker's commission. The Superior Court of Los Angeles County, Charles J. Griffin, J., rendered judgment on the pleadings in favor of plaintiff, and defendant appealed. The District Court of Appeal, Drapeau, J., held that defendant could not avoid liability for broker's commission on ground that joint owner of realty refused to consent to sale at reduced price, where agreement signed by defendant to pay commission contained no condition that it was subject to approval of joint owner.

Judgment affirmed.

1. Pleading 345(1.3)

Plaintiff is not entitled to judgment on the pleadings if answer presents any issue

as to the material allegations of complaint or sets up affirmative matter constituting a defense.

2. Pleading ⚡343, 350(3)

A motion for judgment on the pleadings is in the nature of a general demurrer and in ruling thereon, trial court must treat the allegations of challenged pleading as true.

3. Pleading ⚡350(3)

On a motion for judgment on the pleadings, only the pleadings are considered.

4. Brokers ⚡63(1)

Where real estate broker fulfills terms of his contract by producing a purchaser who is ready, able and willing to buy, vendor cannot avoid liability for broker's commission by wrongful refusal to consummate the sale.

5. Brokers ⚡61(3)

Where deposit receipt, by which husband agreed to sell realty owned jointly by husband and wife to purchasers procured by broker for price offered by purchasers, though less than price specified in listing agreement, and to pay broker's commission, contained no condition that it was subject to approval of wife, husband could not avoid liability for broker's commission on ground that wife refused to consent to sale of realty at reduced price.

6. Brokers ⚡54

Where owner of realty accepts offer made by purchaser procured by broker employed to sell the realty, owner thereby admits the readiness, willingness and ability of purchaser to consummate the sale, and he is estopped from denying purchaser's ability or willingness to complete the purchase.

Harold J. Ackerman, Los Angeles, for appellant.

Gross & Svenson, Van Nuys, for respondent.

DRAPEAU, Justice.

The first amended complaint herein alleges that by written agreement of May 11,

1950, "defendants" employed plaintiff to sell a piece of realty owned by them at a specified price of \$25,500, and that they agreed to pay him a commission of 5% of the selling price. On July 8, 1950, the listing agreement was extended for an additional 90 days. The extension was signed by plaintiff and defendant Simeon B. Nelson.

On July 16, 1950, plaintiff procured purchasers, who agreed to buy the listed property for \$18,600. On that day, defendant signed a deposit receipt in which he agreed to complete the sale of the property for the offered price and to pay a commission of \$930 to plaintiff.

The said complaint further alleges that the buyers were able, ready and willing to complete the purchase; that they and plaintiff have performed their part of the contract, but that defendants have not paid the commission of \$930 which sum is now due and owing to plaintiff.

The answer denies (1) that the purchasers "were willing or ready or able to purchase this answering defendant's interest in his property"; (2) performance of the conditions of the contract; and (3) that the sum of \$930 is due and owing.

Defendant admits (1) the execution of the original agreement of May 11, 1950, by him and his wife, Rosalie; (2) the extension thereof by him; (3) the execution of the deposit receipt on July 16, 1950, by him alone; and (4) the nonpayment of the \$930.

The answer affirmatively alleges that "said deposit receipt was never signed by said Rosalie Nelson * * * that plaintiff was aware of the fact and well knew that the property referred to in said deposit receipt was jointly owned by this answering defendant and his said wife, Rosalie Nelson, and that a sale of the entire property could not be made unless the said wife, Rosalie Nelson joined in the sale, and further alleges that the said wife Rosalie Nelson refused to consent to the sale of said real property at the reduced price * * *."

The trial court granted plaintiff's motion for judgment on the pleadings, and from the ensuing judgment defendant appeals.

It is here urged that the denials and affirmative allegations in the answer raised sufficient issues of fact which, if proved, would defeat plaintiff's cause of action, hence it was error to render a judgment on the pleadings.

[1,2] "It is elementary that a plaintiff is not entitled to judgment on the pleadings if the answer presents any issue as to the material allegations of the complaint, or if it sets up affirmative matter constituting a defense. 21 Cal.Jur. 237-8. A motion for judgment on the pleadings is in the nature of a general demurrer, and the trial court in ruling thereon must treat the allegations of the challenged pleading as true. *MacIsaac v. Pozzo*, 26 Cal.2d 809, 161 P.2d 449, and cases cited; 21 Cal.Jur. 240." *Grant v. Aerodraulics Co.*, 91 Cal.App.2d 68, 73, 204 P.2d 683, 685.

[3] Also, as stated in *Agnew v. Los Angeles City*, 99 Cal.App.2d 105, 107, 221 P.2d 340, 341: "Upon a motion for judgment on the pleadings, as on demurrer, the court considers only the pleadings."

[4] It is well-established law that a broker who has fulfilled the terms of his contract by procuring a purchaser, who is ready, able and willing to buy can recover his commissions even though the vendor refuses absolutely to consummate the purchase or to negotiate with reference to it. In other words, the liability of the owner cannot be avoided by his wrongful refusal to consummate the sale.

"Where a principal has good grounds for refusing to consummate the transaction, and does refuse, the broker is not entitled to recover his compensation. But it has been held that the refusal of cotenants, or the wife of the vendor, to join in the instruments necessary to complete the sale is not sufficient reason for failure to consummate the transaction, and does not deprive the broker of his right to compensation, unless the consent of the cotenants, or the wife, as the case may be, is one of the terms or conditions which must be complied with before the broker is entitled to his commission." 9 Cal.Jur. 2d 265, 266, sec. 95, citing *Kaufman v.*

Haney, 80 Cal.App.2d 249, 182 P.2d 250 and *Dixon v. Malloy*, 70 Cal.App.2d 322, 160 P.2d 896.

In the *Kaufman* case it was held that when a husband and wife hold property in joint tenancy, the husband has authority to bind himself for the payment of a broker's commission for selling it.

And in *Dixon v. Malloy*, *supra*, 70 Cal.App.2d 322, 329, 160 P.2d 896, 899, the court stated: "It was not stipulated as one of the terms of the agency agreement that Mr. Malloy's obligation was conditioned upon his wife's consenting to the sale. Even if the property was community property, neither the fact that Mrs. Malloy did not sign the agency agreement nor the fact that she refused to join with her husband in a sale of the property would avail Mr. Malloy as a defense to the action by the broker. His obligation to the broker became fixed when the latter found a purchaser ready, able and willing and who offered to buy the property upon Mr. Malloy's terms. *Traxler v. Katz*, 1931, 116 Cal.App. 226, 230, 2 P.2d 553; *Russell v. Ramm*, 1927, 200 Cal. 348, 366, 254 P. 532, and cases therein cited."

[5] Likewise here, the agreement contained no condition that it was subject to approval of appellant's wife. As a result, under the authorities hereinabove cited, appellant is bound to pay the broker's commission.

[6] Moreover, appellant's denial that respondent had performed all the conditions of the agreement does not present a triable issue. This for the reason that where "an owner of property accepts the offer made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness and ability of the purchaser to consummate the sale. Under such circumstances he will be estopped to deny the purchaser's ability or willingness to complete the purchase." 9 Cal.Jur.2d 249, § 83, and cases there cited.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

121 Cal.App.2d 17

PEOPLE v. THEODORE et al.

Cr. 4917.

District Court of Appeal, Second District,
Division 1, California.

Nov. 3, 1953.

Hearing Denied Dec. 3, 1953.

Both defendants were convicted of criminal conspiracy to commit grand theft and one defendant was convicted of grand theft. The Court, Edwin L. Jefferson, J., following verdicts of guilty, entered judgment, and denied motions for new trial, but suspended execution of judgments, and granted defendants conditional probation, and defendants appealed. The District Court of Appeal, White, P. J., held that, where evidence revealed striking similarity in technique and scheme followed by one defendant in his dealings with complaining witness and two other witnesses, and jury was adequately instructed concerning limited purpose of testimony of the other two witnesses relating to their dealings with such defendant, other two witnesses' testimony was properly admitted for the limited purpose of showing such defendant's fraudulent intent, his plan, scheme, or design to defraud, and absence of mistake on his part.

Judgments and orders affirmed.

1. Conspiracy Ⓒ24

Gist of the offense of conspiracy is the formation of a combination with others to do some unlawful act or some lawful act by unlawful means. Pen.Code, §§ 182, 184.

2. Conspiracy Ⓒ23

To establish a criminal conspiracy, prosecution must prove a criminal agreement and an overt act done in furtherance of the objects of the conspiracy. Pen.Code, §§ 182, 184.

3. Conspiracy Ⓒ47

In establishing a criminal conspiracy, the compact or agreement between conspirators may be shown by circumstantial evidence.

4. Criminal Law Ⓒ422(1)

Evidence of statements of a co-conspirator made during life of conspiracy are admissible against the other conspirator.

5. Criminal Law Ⓒ427(4)

In prosecution for criminal conspiracy to commit grand theft, all conversations between one defendant and husband of complaining witness, objected to as hearsay, were properly admitted in evidence as tending to establish a conspiracy between the defendants. Pen.Code, §§ 182, 184.

6. Conspiracy Ⓒ45

Because criminal conspiracies are generally proved by circumstantial and piecemeal evidence, a wide latitude must be given the prosecution in producing its evidence.

7. Conspiracy Ⓒ45**Criminal Law** Ⓒ369(1)

In conspiracy cases, it is no objection that the evidence covers a great many transactions and extends over a long period of time, that evidence may show another crime, or that the acts attempted to be established occurred sometime before alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate facts at issue.

8. Criminal Law Ⓒ371(1), 372(1)

Where, in prosecution for criminal conspiracy to commit grand theft and for grand theft, evidence revealed striking similarity in technique and scheme followed by one defendant in his dealings with complaining witness and two other witnesses, and jury was adequately instructed concerning limited purpose of testimony of the other two witnesses relating to their dealings with such defendant, such testimony of the other two witnesses was properly admitted for the limited purpose of showing such defendant's fraudulent intent, his plan, scheme, or design to defraud, and absence of mistake on his part.

9. Witnesses Ⓒ337(5)

Where, in criminal proceeding, one defendant voluntarily took the witness stand, such defendant was subject to impeachment in same manner as any other witness under statute providing that witness may, by way of impeachment, be asked whether he has been convicted of a felony and also be asked the nature of such felony. Code Civ.Proc. § 2051.

10. Witnesses ⇨359

When an accused denies, on the witness stand, a prior conviction, it is proper to produce a duly authenticated copy of the judgment of conviction. Code Civ.Proc. § 2051.

11. Names ⇨20

Statutory presumption of identity of person from identity of name is a rebuttable one. Code Civ.Proc. § 1963, subd. 25.

12. Criminal Law ⇨306

A "presumption" is a species of evidence which, unless controverted, is sufficient proof of the existence of the fact to which it relates. Code Civ.Proc. § 1963, subd. 25.

See publication Words and Phrases, for other judicial constructions and definitions of "Presumption".

13. Witnesses ⇨359

Where, in prosecution for criminal conspiracy to commit grand theft and for grand theft, one defendant denied that he had theretofore been convicted of felony of using mails to defraud, permitting, for purpose of impeachment, admission in evidence of exemplified copy of judgment and commitment in federal District Court in Missouri of person having same name as such defendant for such crime was not error in view of fact that such defendant did not offer any evidence to rebut presumption that he was the person named in the judgment and commitment. Code Civ. Proc. §§ 1963, subd. 25, 2051.

14. Criminal Law ⇨325

Conclusive presumptions and many disputable presumptions are not overcome by the presumptions of innocence, and, therefore, presumption that one defendant in criminal proceeding was same person as that described by such defendant's name in judgment and commitment in federal District court in Missouri did not clash with presumption that defendant was innocent of crime charged against him in California. Code Civ.Proc. §§ 1961, 1962.

15. Witnesses ⇨337(5)

For purpose of determining whether accused has been convicted of a felony so

that he may be impeached by showing record of judgment of conviction, statute defining felonies and misdemeanors is not applicable to crimes committed in other jurisdictions, but determination whether crime committed outside state is a felony or misdemeanor for purpose of impeachment depends upon law of jurisdiction in which offense was committed. Pen.Code, § 17.

16. Criminal Law ⇨27

Under California law, character, as felony or misdemeanor, of an offense punishable by imprisonment in state prison or by fine or imprisonment in county jail is determined by actual sentence imposed, but, under Federal law, the length of possible sentence which may be imposed is determinative. Pen.Code, § 17; 18 U.S.C.A. § 1.

17. Witnesses ⇨337(6)

Where person accused of criminal conspiracy to commit grand theft and of grand theft had been previously convicted in federal court of using mails to defraud, for which fine of not more than \$1000 or imprisonment of not more than five years, or both, could have been imposed, such prior conviction constituted a felony under federal law, and, therefore, evidence of the judgment and commitment could be used in the subsequent prosecution against such person. Pen.Code, § 17; 18 U.S.C.A. §§ 1, 1341.

18. Criminal Law ⇨814(1)

In prosecution for criminal conspiracy to commit grand theft and for grand theft, refusal to give offered instructions pertaining to corroboration required to sustain conviction of theft by false pretenses was not error in view of fact that case was prosecuted upon theory of embezzlement and larceny by trick or device. Pen.Code, § 1110.

19. Embezzlement ⇨44(1)

Larceny ⇨55

Neither embezzlement nor larceny by trick or device require corroboration in accordance with provisions of statute setting forth corroboration required to sustain conviction of theft by false pretenses. Pen. Code, § 1110.

20. Criminal Law Ⓒ814(3)

Theories attain a value in a criminal case only to extent that they are supported by substantial evidence.

21. Criminal Law Ⓒ770(3)

In prosecution for criminal conspiracy to commit grand theft and for grand theft, wherein case was prosecuted on theory of embezzlement and larceny by trick or device, refusal to instruct jury that they must unanimously agree upon one of the types of theft charged was not error.

22. Criminal Law Ⓒ829(1)

In prosecution for criminal conspiracy to commit grand theft and for grand theft, refusal to give requested instruction pertaining to rights of partnership or joint venture to control money and accounts in any manner connected therewith without being guilty of theft was not error in view of fact that jury was correctly instructed that one joint venturer could not be guilty of theft against another joint venturer.

23. Criminal Law Ⓒ1172(8)

In prosecution for criminal conspiracy to commit grand theft and for grand theft, refusal to give requested instruction that fact that property was appropriated openly and avowedly and under claim of title preferred in good faith, even though such claim was untenable, constituted a defense to embezzlement was not error in view of fact that instructions as to joint venturers were given at request of complaining defendant, who advanced theory that he and complaining witness were in a joint venture, but jury, by bringing verdict of guilty, disbelieved such defendant's theory.

24. Criminal Law Ⓒ782(9)

In criminal proceeding, trial judge must correctly, fully, and fairly advise jury concerning kind, quantity, and degree of proof necessary before defendant can be convicted of offenses charged against him.

Morris Lavine, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Dep. Atty. Gen., S. Ernest Roll,

Dist. Atty., Jere J. Sullivan, Dep. Dist. Atty., Robert Wheeler, Dep. Dist. Atty., Los Angeles, for respondent.

WHITE, Presiding Justice.

In Count I of an information filed by the District Attorney of Los Angeles County, defendants Peter M. Theodore and Charles E. Melton, were charged with criminal conspiracy to commit grand theft, twenty-one overt acts being set forth. In Counts II, III, IV, V and VI, defendant Theodore only was charged with grand theft, each count alleging the felonious taking of money from Fay B. Langendorf.

The jury returned verdicts of guilty as charged upon all counts of the information. Motions for a new trial were denied and judgments pronounced, execution thereof being suspended and defendants granted conditional probation. The appeals now before us are from the judgments and the orders denying motions for a new trial.

For a consideration of appellants' contentions, an epitome of certain portions of the evidence is necessary.

The defendants Melton and Theodore posed as father and son, the son being known as "Ted Melton", but it is undisputed that they were not related. They had first met in 1934 or 1935. In 1949 Theodore ("Ted Melton") told his true father that he was going to California, where he might find "some good suckers." In February, 1950, Theodore and Melton met in the latter's room in Santa Monica. Melton allowed Theodore to have his Lincoln Continental automobile. Melton told his landlady that his "boy" was coming to see him; that they had not met for 15 years.

Allen R. Langendorf, husband of the complaining witness, Fay Langendorf, operated a real estate brokerage office in Santa Monica. Mr. and Mrs. Langendorf jointly owned some stock in Langendorf Bakery. In March, 1950, defendant Melton appeared at the Langendorf real estate office and asked to work there as a salesman. To this Langendorf agreed. Subsequent to Melton's entering the office as a salesman the witnesses Fred Ballagh and Mr. and

Mrs. Felmar came to work in the same office.

Mrs. Langendorf first met defendant Melton early in April, 1950, at her husband's real estate office. Mrs. Langendorf came frequently to the office, and during the period from early April until about May 15, 1950, she had approximately eighteen conversations with Melton, in which he talked about his "son", "Ted Melton". Defendant Melton repeatedly stated that he had not seen his "son" for a couple of years; that he was expecting his arrival from the oil fields of Wyoming in about a month. He further stated to Mrs. Langendorf (and others) that his "son" was a brilliant attorney, an oil engineer, and a C.P.A.; that he was doing work for a number of oil companies; that he had had many transactions on the New York Stock Exchange, was an expert in stocks, and had made a great deal of money in stocks. Melton further said that his "son" had attended U.S.C., U.C.L.A., and the University of California. Mr. Langendorf and Mr. and Mrs. Felmar were present at some of these conversations. In June, 1950, defendant Melton told the witness Ballagh that his "son" was a noted geologist and oil man.

Shortly after he came to work at the Langendorf office, Melton made statements to Mr. Langendorf concerning his "son" similar to those immediately above set forth, adding that his "son" had attended an eastern university, had a substantial income from oil royalties and a large salary, because he combined the work of a lawyer and an engineer; that he was connected with a brokerage office and "made money" for everybody he ever advised on stocks, oils and investments. These and similar statements Melton continued to make up to the time of the arrival of the "son" on the scene about May 15, 1950, and also thereafter.

By defendant Theodore's own admissions on the witness stand, it appears that he had never attended U.S.C. or U.C.L.A.; defendant Melton was not his father; Theodore had never been an attorney, never went to law school; was never a certified

public accountant or an oil engineer; he had "not very much" experience in the stock market, and did not really understand the meaning of buying stocks on margin until it was explained to him by a broker during his stock transactions with Mrs. Langendorf. In the Army he had been a private and a private first-class, and not an Air Force captain. He did not have "connections" with Texas people dealing in oil royalties, as had been represented.

Defendant Melton made admissions to investigators. He admitted that a man named Yant, whom he had introduced to the Langendorfs had "done time" in connection with the sale of oil interests; that Theodore had telephoned him (Melton) three or four times from New York before he introduced Theodore to the Langendorfs; that he had "faked" long distance telephone calls with reference to Theodore's supposed \$30,000 job with an oil company in South America; that he had maintained throughout that Theodore was his son; that the story of the South American job was building up to the "take"; that he knew what Theodore's "front" was for; that he was "building the guy up". He knew Theodore was obtaining money from Mrs. Langendorf.

Defendant Theodore, in the role of "Ted Melton", arrived at Langendorf's real estate office driving a Lincoln Continental automobile. Mr. Langendorf was present, and also Mrs. Felmar. "Father" and "son" staged a touching reunion, embracing each other, and the "father" weeping.

Thereafter Theodore and the Langendorfs became friendly, going out socially together and meeting at Theodore's apartment at an exclusive Beverly Hills hotel. Included in the party from time to time were Kay George and Sophie Ephim (whose testimony as to their financial difficulties with Theodore was admitted, over objection, as evidence of "similar transactions.").

Theodore advised Mrs. Langendorf that the only way she could protect herself against her husband's gambling proclivities and "gamblers" was to sell the stocks held by them (as to which Mr. and Mrs. Langen-

dorf had signed "joint stock powers"). He showed her Mr. Langendorf's check for \$150 which he stated represented a loan and that Mr. Langendorf said he needed it right away as he was in a terrible gambling debts "jam" for as much as \$20,000. (Mr. Langendorf testified he had never had large gambling debts.)

During the period from June 12, 1950, to July 14, 1950, Theodore persuaded Mrs. Langendorf to entrust him with sums of cash derived from the sale by her of stocks. He undertook to use the money to purchase oil royalties from which he said she would realize returns of from 20% to 25%, and to open a brokerage account with a firm of Beverly Hills brokers in her behalf and secure her substantial profits through his expert manipulations. Upon receiving the money from time to time he consistently refused to give a receipt, saying that he dealt in cash and thereby saved a great deal on income taxes. He proposed that they each invest a similar amount in a "pool" and buy on margin, but that he should handle the account.

From June 12 to July 14, Mrs. Langendorf gave to Theodore a total of \$26,700, in the respective sums of \$5,000, \$3,000, \$5,000, \$4,200 and \$9,500, each of these sums constituting the basis of the five counts of grand theft contained in the information. On this total of \$26,700, he deposited \$9,000 in his own bank account and \$17,700 into his brokerage account. He never purchased any oil royalties for Mrs. Langendorf. He never deposited any of his own money in the brokerage account. He did not cause the account to be made a joint account, nor did he have himself described as a trustee; the account stood in his name alone. Further details as to these transactions, involving a payment by the brokers to Mrs. Langendorf and a withdrawal by Theodore from the brokerage account, need not be set forth, as no contention is made (nor could it well be made under the evidence) that the evidence is insufficient to support the several verdicts. For the same reason it is unnecessary to recite additional evidence as to the subterfuges and falsehoods by which Theodore obtained the funds from Mrs. Langen-

dorf and thereafter put off her demands for an accounting. Only enough of the voluminous testimony has been set forth to show the method of operation of the defendants in the commission of the crimes of which they were convicted, so as to demonstrate the correctness of the rulings of the trial judge in admitting evidence of representations made to the husband of the complaining witness and evidence of the "similar transactions" had with the witnesses Kay George and Sophie Efthim.

Appellants' contention that the court erred in admitting testimony by Mr. Langendorf concerning representations made to him is without merit. The defendants were charged in Count I of the information with conspiracy, twenty-one overt acts being set forth. The crimes of grand theft contained in Counts II to VI were separate substantive offenses and were not included as overt acts under Count I.

[1, 2] The claim of appellants that Mr. Langendorf's testimony concerning appellant Melton's conversations with the witness was inadmissible because it was hearsay as to appellant Theodore is untenable. Both appellants were jointly charged in Count I with the crime of conspiracy to commit grand theft. The gist of the offense of conspiracy is the formation of a combination with others to do some unlawful act or some lawful act by unlawful means. It is incumbent on the prosecution to prove a criminal agreement and an overt act done in furtherance of the objects of the conspiracy. Penal Code Secs. 182, 184.

[3] That the compact or agreement between the conspirators may be shown by circumstantial evidence is firmly established by the courts. *People v. Pierce*, 110 Cal. App.2d 598, 610, 243 P.2d 585.

[4] As stated in *People v. Schmidt*, 33 Cal.App. 426, at page 444, 165 P. 555, at page 563: "* * * It is a fundamental rule long settled by decisions that in proving a conspiracy it is not necessary that proof be made that the parties met and actually agreed to undertake the performance of the unlawful act, and that a conspiracy may be shown by proof of facts and circumstances sufficient to satisfy the jury

of the existence of the conspiracy, leaving the weight and sufficiency of the evidence to the triers of the questions of fact. * *

'Evidence of the statements of a coconspirator, made during the life of the conspiracy, are admissible against the other conspirator.' People v. Oldham, 111 Cal. 648, 44 P. 312." (Emphasis added.) See also: People v. Burton, 91 Cal.App.2d 695, 708, 205 P.2d 1065; People v. Correa, 44 Cal. App. 634, 641, 186 P. 1055.

[5] All of the conversations between appellant Melton and Mr. Langendorf were properly admitted in evidence as tending to establish a conspiracy between Melton and Theodore. Such conversations were but a part of the conversations had by Melton and Theodore with other persons around the Langendorfs' real estate office as to the alleged attainments and business qualifications of Melton's so-called "son" Theodore, things that were said to Mr. and Mrs. Felmar and to Mr. Ballagh as well as to the Langendorfs, and all of which had a bearing upon the conspiracy as showing Melton's false "build-up" of Theodore for the purpose of establishing his "son" as a man worthy of confidence and trust.

When consideration is given the overall modus operandi of appellants' scheme to defraud, it is manifest that the testimony warranted the conclusion that appellant Melton was to be, as respondent suggests, the "advance man"; that it was he who had to "soften up" the opposition for the major blow to be performed by the artist Theodore. Melton "fattened" up the bait for the "kill" to be made by Theodore. Thus his conversations with the husband of the victim of the conspiracy and grand theft charges were relevant and material in fitting together the various parts which made up the complete whole of the conspiracy.

[6] Because criminal conspiracies are generally proved by circumstantial and piecemeal evidence, a wide latitude must be given the prosecution in producing its evidence. People v. Stevens, 78 Cal.App. 395, 248 P. 696; People v. Bateman, 111 Cal. App. 109, 295 P. 530; Metzler v. United States, 9 Cir., 64 F.2d 203.

As so aptly stated by the court in People v. Stevens, 78 Cal.App. 395, at pages 406 and 407, 248 P. 696, at page 700:

[7] "A conspiracy may have a very small and a very remote beginning. Like a gigantic member of the forest, it may originate in a tiny tendril, which requires a long time and a persistent nurture to be developed into the matured monarch of the grove. It is for this reason that it is said in a standard publication that, in conspiracy cases—'it is no objection that the evidence covers a great many transactions and extends over a long period of time, that it may show another crime, that the acts, evidence to show which is offered, occurred some time before the alleged formation of the conspiracy, provided, however, that the facts shown have some bearing on and tendency to prove the ultimate facts at issue.' 12 C.J. 635."

It is next contended that the court erred in admitting the testimony of Katherine Vasila and Sophie Efthim on the theory that they were "similar transactions."

In May, 1950, Theodore talked to Miss Vasila two or three times, urging her to invest her money, telling her he had over \$200,000 worth of U. S. Steel; that he could invest her money for her in stocks through his New York broker *in her name* and she would receive \$20 a month income. On May 12, 1950, she gave him \$1,000 in cash, receiving no receipt. When she asked him for her stocks he told her it would take time for them to come through from New York. He paid her \$20 as interest on two occasions. Although she repeatedly asked for her stocks, she never received them, nor did she ever receive any money from Theodore. In June, 1951, the night before the preliminary hearing in this cause, at the home of the attorney who represented him at the preliminary hearing, Theodore gave Miss Vasila his promissory note for the money due her.

Sophie Efthim first met Theodore in January, 1944. He told her he had attended U. S.C., U.C.L.A., and the University of Montana. In April, 1950, in St. Louis, Missouri, Theodore told Miss Efthim that it was silly to keep her money in a bank when she could earn 15% in stocks through his

broker under her name. In June, 1950, she came to California at Theodore's invitation and stayed at a hotel for which accommodations Theodore paid the rental. In September, 1950, in St. Louis, Theodore asked her to reconsider investing, and she later sent him by registered mail to Phoenix, Arizona, \$600. In January, 1951, he told her he could not understand why she had not received her stock certificates; in June, 1951, he replied by telephone to her letters and told her that her money was safe with him. In July, 1951, in St. Louis, he told her he was not going to keep her \$600 in stocks, but put it in something much better, a gift shop in Phoenix; that he would send her articles of incorporation to sign. She later sent him an additional \$250 and then \$200 more, believing she would be on the board of directors and receive stock. Just before the trial of this cause Theodore phoned her and asked her not to "play ball" with the Langendorfs. Miss Efthim never received any money back from Theodore except \$45, nor did she receive any stock. (When Theodore was unsuccessfully attempting to settle with Mrs. Langendorf shortly before the preliminary hearing, he offered to give the Langendorfs a half-partnership in a Phoenix costume jewelry business.)

Appellants urge error in the admission of the foregoing testimony of Katherine Vasila and Sophie Efthim on the ground that transactions between them cannot be characterized as similar.

[8] A review of the evidence, however, at once suggests a striking similarity in the technique and scheme followed by appellant Theodore in his dealings with Mrs. Langendorf, the complainant herein, and the Misses Vasila and Efthim. Therefore, the testimony of the latter two witnesses relating to their dealings with appellant Theodore was properly admitted for the limited purpose of showing his fraudulent intent, his plan, scheme or design to defraud, and the absence of mistake on his part. The jury was adequately and correctly instructed by the trial judge as to the limited purpose of such evidence.

In answering a contention that the court erred in admitting evidence of similar transactions, our Supreme Court, in the case of

People v. Whalen, 154 Cal. 472, 476, 98 P. 194, 197, said: "Evidence was given upon the trial that the defendant, prior to the transaction in controversy, had made substantially the same representations to other persons in an endeavor to sell to them stock in the same company. It was proper for the court to admit evidence of this character to show that the representations were not inadvertent, but were deliberately made, with knowledge of the facts, and with intent to deceive. 'Evidence of similar offenses involving the making of other false representations is admissible against the prisoner to show that he is aware of the falsity of the statements made by him in the present case, and that, knowing them to be false, he made them with the intent to deceive.'"

People v. Albertson, 23 Cal.2d 550, 145 P. 2d 7, does not aid appellants because it is easily distinguishable under the facts and circumstances here present.

Appellants earnestly assert prejudicial error in the ruling of the trial court permitting, for the purpose of impeachment, proof that appellant Theodore had suffered a prior conviction of a felony.

In this regard, the record reflects that on cross-examination of appellant Theodore, he was asked if he had theretofore been convicted of a felony—that of using the United States mails to defraud. His answer was that he had not been so convicted. Thereupon, over objection, the prosecution offered in evidence an exemplified copy of the Judgment and Commitment in the District Court of the United States, Western District of Missouri. The proffered record was objected to on the ground that no foundation was laid, that more has to be shown than merely similarity of names; that the judgment was a sentence to a jail and could not be a felony for any purpose under the laws of this state; and that the Exhibit was incompetent, irrelevant and immaterial. From the document in question, among other things, it appears that the title of the case upon which the indictment was based was: "United States v. Peter Michael Theodore, alias George Theodore, alias Thomas Hart." It also appears that there is a "Judgment and Commitment" against "Peter Michael Theodore" only, showing that on the 28th day of

February, 1941, the defendant was "convicted on his plea of guilty of the offenses charged in the indictment in the above entitled cause, to-wit, using the United States mails in furtherance of a scheme to defraud." The defendant was "committed to the custody of the Attorney General for imprisonment in an institution of the jail type to be designated by the Attorney General or his authorized representative for a period of sixty (60) days, without costs."

[9, 10] Section 2051 of the Code of Civil Procedure provides that a witness may, by way of impeachment, be asked whether he has been convicted of a felony, and may also be asked the nature of the felony, *People v. Chin Hane*, 108 Cal. 597, 607, 41 P. 697; *People v. Putnam*, 129 Cal. 258, 61 P. 961. Appellant Theodore, having voluntarily taken the witness stand, was obviously subject to impeachment in the same manner as any other witness, under this section. And, when an accused denies the prior conviction it is proper to produce a duly authenticated copy of the judgment of conviction, *People v. Chenault*, 74 Cal.App.2d 487, 493, 494, 169 P.2d 29; *People v. Chin Hane*, supra, 108 Cal. at page 607, 41 P. at page 700.

[11-13] Appellant Theodore contends that the prosecution did not sufficiently establish his identity as *the* Peter Michael Theodore named in the said judgment and commitment. Such a contention, however, disregards the nature and value of a presumption. Under section 1963, subdivision 25, of the Code of Civil Procedure, there is a presumption of identity of person from identity of name. The presumption is a rebuttable one, but in the case at bar appellant Theodore offered no evidence to rebut the presumption that he (Peter Michael Theodore, which he testified was his full name) was the Peter Michael Theodore named in the judgment and commitment received in evidence. It is a rule of law that a presumption constitutes a species of evidence which, unless controverted, is sufficient proof of the existence of the fact to which it relates, *People v. Williams*, 125 Cal.App. 387, 388, 13 P.2d 841; *People v. Little*, 41 Cal.App.2d 797, 799, 107 P.2d 634, 108 P.2d

63; *People v. Sberno*, 22 Cal.App.2d 392, 71 P.2d 274; *Hefferman v. U. S.*, 3 Cir., 50 F. 2d 554.

[14] Appellants next insist that the foregoing presumption "clashes" with the presumption of innocence. We fail to see the force of this argument. All presumptions as heretofore stated, are a species of evidence. Conclusive presumptions, Code of Civil Procedure, §§ 1961, 1962, are not overcome by the presumptions of innocence, nor are many disputable presumptions so overcome, *People v. Le Doux*, 155 Cal. 535, 553, 102 P. 517; *People v. Cline*, 79 Cal.App.2d 11, 15, 179 P.2d 89.

Appellant next argues that since the punishment imposed for the previous conviction of a federal offense was a jail sentence of sixty days, it was not a felony in California, Penal Code, § 17, and therefore could not be used to impeach the testimony given by appellant Theodore.

It should be remembered that we are not here concerned with the effect of prior felony convictions other than prior conviction of a felony as a basis for impeachment of a witness. The question is what is meant by the language of section 2051 of the Code of Civil Procedure that a witness may be impeached by showing by "the record of the judgment, that he has been convicted of a felony". In solving that question, we are impressed that cases based upon specific California Penal Code provisions as to prior conviction of a felony with respect to habitual criminals or as bearing upon punishment and the right to probation, etc., have no application to the precise question now before us.

[15] Appellant Theodore, it appears, relies on the rule applicable to the habitual criminal statute in California, Penal Code, § 644(a), and Penal Code, § 17, which defines felonies and misdemeanors. We are satisfied that the provisions of section 644(a) of the Penal Code have no application here, and that section 17 of the same Code applies to crimes committed in this state, and has no application to crimes committed in other jurisdictions.

Whether or not a crime committed outside of California is a felony or misdemean-

or for the purposes of impeachment, depends upon the law of the jurisdiction in which the offense was committed. As was said by this court in *Caminetti v. Imperial Mutual Life Ins. Co.*, 59 Cal.App.2d 476, 490, 139 P.2d 681, 688: "* * * That the offense charged was a felony must also be conceded. 18 U.S.C., 541; State [ex rel. Anderson] v. Fousek, 91 Mont. 448, 8 P.2d 791, 84 A.L.R. 303. True a different rule is prescribed by our statute which classifies crimes after judgment as felonies or misdemeanors according to the penalty actually imposed. Penal Code, section 17. *But that statute has application only to crimes under our State statutes and has nothing to do with crimes denounced by the Federal statutes. It is the law of the jurisdiction where the crime was committed that determines the character of the offense as a felony or a misdemeanor.* State [ex rel. Anderson] v. Fousek, supra." (Emphasis added.) Accordingly, in order to determine the character of the offense committed and which is here involved, we must look to the federal law under which appellant Theodore was convicted.

The section defining felonies and misdemeanors under federal law, and which was in effect at the time of appellant Theodore's alleged prior conviction in the federal court, reads as follows:

"Section 541. (*Criminal Code, section 335.*) *Felonies and misdemeanors.* All offenses which may be punished by death or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors. (Mar. 4, 1909, c. 321, § 335, 35 Stat. 1152.)" United States Code Annotated, Title 18, Criminal Code and Criminal Procedure, Section 541 to End, 1940 Edition, including Pocket Parts, pp. 3-4.¹ (Emphasis added.)

[16] While in California the rule is that the character of an offense punishable by imprisonment in the state prison or by fine or imprisonment in a county jail, is determined by the actual sentence imposed, the rule under the Federal law is that the length

of possible sentence which may be imposed is determinative.

In *Creekmore v. U. S.*, 8 Cir., 237 F. 743, at page 754, L.R.A.1917C, 845, it was said: "* * * It will be observed that section 335, in defining felonies, said nothing about penitentiaries. *It is the length of possible imprisonment that fixes whether the offense is a felony or a misdemeanor.* It must be borne in mind that, while nearly all of the states have both penitentiaries and jails, the United States has no prisons except its penitentiaries, save as it has the use of state institutions. We see no reason why, under Judicial Code, § 268, the court could not sentence a guilty party for a year and a day, and, if it had this power, then section 335 of the Criminal Code made it a felony. * * " (Emphasis added.) See also: State ex rel. Anderson v. Fousek, 91 Mont. 448, 8 P.2d 791, 84 A.L.R. 303, 307-309.

[17] Directing our attention now to the facts in the instant case, the statutory offense for which appellant Theodore was previously convicted was a violation of section 338, Title 18 U.S.C.A. At the time judgment was pronounced and commitment issued on the previous conviction of appellant Theodore, the penalty prescribed for a violation of said section was as follows: "* * * shall be fined not more than \$1,000, or imprisonment not more than five years, or both," 18 U.S.C.A.Crim.Code and Proc. Secs. 261-540, 1940 Ed., pp. 134-135.² (Emphasis added.)

Since the test to be applied in determining whether a person has been convicted of a felony or a misdemeanor when he has violated a federal statute, is the punishment that may be inflicted and not what was actually imposed, it is manifest that the trial court was correct in allowing the introduction into evidence of the record of appellant Theodore's prior conviction.

[18] Finally, appellants insist that the court erred in refusing to give to the jury certain instructions proffered by them. In this regard, it is urged by appellant Theodore who was charged in Counts II to VI of

1. See 1948 Revised Criminal Code, 18 U.S.C.A. § 1.

2. See 1948 Revised Criminal Code, 18 U.S.C.A. § 1341.

the information with the crime of grand theft, that the court refused to give certain instructions pertaining to theft. Appellant's apparent contention is that being charged with theft, and the crimes of larceny, embezzlement and false pretenses being now combined under the designation of theft, that "each of the theories requires a different quantity of proof", and that the court erred in refusing to give his instruction on the corroboration required to sustain a conviction of theft by means of false pretenses. The first of the instructions offered pertains to corroboration required to sustain a conviction of theft by false pretenses as required by section 1110 of the Penal Code. This instruction was properly refused because the case was not prosecuted on the theory of false pretenses, but on the theory of embezzlement and larceny by trick or device, which fact is disclosed by the record.

[19] Neither embezzlement nor larceny by trick and device requires corroboration in accordance with the provisions of Penal Code, § 1110. *People v. Stanley*, 58 Cal. App.2d 310, 135 P.2d 414; *People v. Tenant*, 32 Cal.App.2d 1, 10, 88 P.2d 937; *People v. Pyle*, 44 Cal.App. 130, 132, 185 P. 1019.

[20] Theories attain a value in a criminal case only to the extent that they are supported by substantial evidence, *People v. Temple*, 102 Cal.App.2d 270, 280, 227 P.2d 500. The court instructed the jury upon the theories advanced by the prosecution and there is no contention that the theories upon which the case was submitted to the jury are not "supported by substantial evidence", nor is there any claim of error in the giving or refusing to give any instructions on the theories advanced by the prosecution.

[21] Appellants also predicate error on the refusal to give a requested instruction which, in substance, stated that the jury must unanimously agree upon the type of theft where the people rely on different theories, viz., embezzlement or larceny. The court, however, did instruct the jury that, "In order to return a verdict it is necessary that all twelve of the jurors agree to a decision." The court further instructed the jury: "It is *not* necessary that all of you agree as to which of the types of theft was

committed, but it *is* necessary that all of you agree that the property was fraudulently appropriated by the defendant." Such further instruction stated the rule announced in *People v. Nor Woods*, 1951, 37 Cal.2d 584, 586-587, 233 P.2d 897, that the jury must agree only that the property was fraudulently appropriated by the defendant. The rule in the *Nor Woods* case, *supra*, was followed in *People v. Chavez*, 1951, 37 Cal.2d 656, 670-672, 234 P.2d 632, and in *People v. Waxman*, 1952, 114 Cal.App.2d 399, 408-410, 250 P.2d 339, 345-346. Each of these last cited cases held that there is no merit in the contention now advanced by appellants.

[22] Appellant Theodore further complains of the court's refusal to give his requested instruction pertaining to the rights of a partnership or joint venture to control the money and accounts in any manner connected therewith, without being guilty of theft. The court did however, instruct the jury as to a joint venture, advising them that one joint venturer cannot be guilty of theft against another joint venturer. The instructions given on this issue were both correct and sufficient.

[23] Finally, appellant Theodore urges that the court erred in refusing to give his requested instruction to the effect that it is a defense to embezzlement that the property was appropriated "openly and avowedly and under a claim of title preferred in good faith even though such claim is untenable."

This contention is without merit. As pointed out by respondent, "in no event could there be prejudicial error in refusing to give the last mentioned instruction pertaining to appropriating the money openly under a claim of title and in good faith, because, under the instructions as to joint venturers which were given at the request of the appellant Theodore, it was his theory that he and Mrs. Langendorf were in a joint venture. The court instructed the jury that one joint venturer cannot be guilty of theft against another joint venturer and if the jury finds from the evidence that the defendant was a joint venturer with Mrs. Langendorf they should acquit him. By bringing in a verdict of guilty, the jury dis-

believed defendant's version of his dealings with the victim."

[24] From a reading of all the instructions given, we are impressed that the trial judge correctly, fully and fairly advised the jury as to the kind, quantity and degree of proof necessary before appellants could be convicted of the offenses charged against them. This is all the law requires.

We are satisfied that no reversible error was committed, and the judgments and orders are therefore affirmed as to each defendant.

DORAN, J., and SCOTT, J. pro tem., concur.

Hearing denied; CARTER and SCHAUER, JJ., and DOOLING, J. Pro Tem., dissenting.



121 Cal.App.2d 173

PEOPLE v. WALKER.

Cr. 5074.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1953.

Defendant was convicted of possessing marijuana. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment, and defendant appealed. The District Court of Appeal, Fox, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Poisons ⚡4, 9

To sustain conviction of possession of narcotics, it must be shown that defendant had either physical or constructive possession and that he was aware that substance of which he had possession was a narcotic, but such knowledge may be shown by defendant's conduct and behavior. Health and Safety Code, § 11500.

2. Criminal Law ⚡1202(3)

Poisons ⚡9

Evidence was sufficient to sustain conviction for possession of marijuana and to

establish a prior conviction. Health and Safety Code, § 11500.

3. Criminal Law ⚡37

"Entrapment" is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated offense except for the trickery, persuasion, or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

4. Criminal Law ⚡569

In prosecution for possessing marijuana, evidence, which did not show that either of the two arresting officers had ever contacted defendant directly or indirectly through use of a decoy, or that his alleged accomplice was working with the police officers, was sufficient to sustain trial court's finding that there was no trickery, persuasion or allurement employed by officers to entrap defendant into commission of offense. Health and Safety Code, § 11500.

John H. Marshall, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Michael J. Clemens, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was charged with the possession of marijuana in violation of section 11500 of the Health and Safety Code. It was also alleged that he had suffered a prior conviction for violating the same code section and had served a term in the state prison therefor. He entered a plea of not guilty and denied the prior conviction.

Upon a trial by the court without a jury defendant was found guilty, and the charge of a prior conviction was found to be true. Defendant appeals from the ensuing judgment.

Defendant seeks a reversal upon these grounds: (1) that the People failed to prove (a) that he knowingly had possession of narcotics; and (b) that the bag containing marijuana introduced in evidence

was ever in his possession; (2) that his arrest was procured through unlawful entrapment. There is no substance in either of these contentions.

[1] In order to sustain a conviction of possession of narcotics it must be shown that the defendant had either physical or constructive possession, and that he was aware that the substance of which he had possession was a narcotic. *People v. Gory*, 28 Cal.2d 450, 456, 170 P.2d 433. Such knowledge, of course, may be shown by the conduct and behavior of the defendant. *People v. Foster*, 115 Cal.App.2d 866, 868, 253 P.2d 50.

[2] The evidence discloses that Police Officers Kennedy and Neale discovered a paper sack containing marijuana which had been completely hidden in a pile of weeds in a vacant lot opposite 4530 South Hoover Street, in the city of Los Angeles. They kept the lot under observation. Defendant approached the lot in a car driven by Morris Johnson, whom defendant had known for three or four months. He left the car, went to the pile of weeds, which were some ten feet from the sidewalk, and was seen bending over them. He was then observed removing a paper sack from this pile of weeds, after which he started to return to the waiting car at the curb. When he had almost reached the automobile the police officers identified themselves. When the driver of the vehicle energized the motor, one of the officers drew his gun and commanded him to stop. At that juncture, while in the act of seating himself in the vehicle, defendant threw the bag away in an underhanded motion, the officers retrieving it as it rolled down the street. Defendant admitted to the police, and also testified, that he threw the paper sack away because he was "scared." Scientific tests disclosed that the bag contained marijuana.

Defendant emphasizes that the bag was twisted round and round and that he had no time or opportunity to unwind it and examine its contents; consequently he had no knowledge that the bag contained mari-

juana. It is significant, however, that defendant was able, without any apparent difficulty, to find this bag which had been completely hidden from view, and when accosted by the police threw it away in an effort to escape detection. These facts and circumstances inescapably point to a consciousness of guilt, and fully justified the trial court in drawing the inference that defendant had prior knowledge of the location of the paper sack and that it contained marijuana.

Defendant's own testimony definitely establishes that the bag was in his possession.

The court was apparently not impressed with his narrative to the effect that as he was taking a shortcut across this vacant lot and came near the sidewalk he observed an acquaintance, Morris Johnson, sitting in his parked car at the curb; that Johnson said to him, "Hand me that paper sack there"; to which he responded, "Where"? That Johnson then pointed it out to him and he simply, innocently, picked it up.

[3, 4] Defendant's claim of entrapment is lacking in merit. "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated, it except for the trickery, persuasion, or fraud of the officer. In other words, persuasion or allurement must be utilized to entrap." *People v. Schwartz*, 109 Cal.App.2d 450, 454, 240 P.2d 1024, 1027; *People v. Neal*, 120 Cal.App.2d 329, 261 P.2d 13. There was no evidence that either of the officers had ever contacted the defendant directly or indirectly through the use of a decoy, or that Johnson, the driver, was working with the police officers. The trial court was amply justified in impliedly finding that there was no trickery, persuasion or allurement employed by the officers to entrap defendant into the commission of this offense. On the record before us it cannot be said, as a matter of law, that entrapment was established.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

121 Cal.App.2d 145

FREEDMAN et al. v. WILLEFORD et al.
Civ. 4465.District Court of Appeal, Fourth District,
California.

Nov. 5, 1953.

Action by owners and occupants of automobile for damages which defendants asserted resulted when left front fender of plaintiffs' automobile struck handle of binder used to fasten chain which held down crane boom loaded in center of truck which was travelling in direction opposite to that being travelled by automobile, and chain was thereby loosened, causing boom to swing in front of plaintiffs' windshield, and which plaintiffs asserted happened because boom extended across center lane of highway when automobile and truck met, and struck automobile windshield. The Superior Court of Orange County, Robert Gardner, J., entered a judgment for defendants and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that contributory negligence of plaintiffs was for jury.

Judgment affirmed.

1. Automobiles ⇨245(79)

In action by owners and occupants of automobile for damages which defendants asserted resulted when left front fender of plaintiffs' automobile struck handle of binder used to fasten chain which held down crane boom loaded in center of truck which was travelling in direction opposite to that being travelled by automobile, and chain was thereby loosened causing boom to swing in front of plaintiffs' windshield, and which plaintiffs asserted happened because boom extended across center lane of highway when automobile and truck met, and struck automobile windshield, contributory negligence of plaintiffs was for jury.

2. Appeal and Error ⇨1068(3)

Where jury in action for damages resulting from automobile accident apparently concluded that plaintiffs had not met burden of proving negligence or that defendants established contributory negligence, given instruction on unavoidable accident was not

prejudicial to plaintiffs, even if erroneously given.

3. Appeal and Error ⇨1060(1)

Comment of attorney for defendant on action for damages resulting when boom on defendants' truck struck plaintiff's automobile as truck and automobile passed on highway, to effect that plaintiff's counsel who made uncomplimentary remarks concerning witness for defendants was talking from depths of a cesspool, and that such uncomplimentary remarks would not have been made except in safety of court room, were not so prejudicial and uninvited under circumstances as to justify reversal of judgment for defendants.

Sowell & Stern, Bellflower, for appellants.

Parker, Stanbury, Reese & McGee, Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiffs, as owners and occupants of a Nash sedan, brought this action for personal injuries and property damage against defendant Raymond Eugene Willeford, driver, and A. E. Fowler & Sons, a copartnership, owners of a truck loaded with a jib boom, which plaintiffs allege contacted their vehicle while they were passing the truck on the highway.

Defendants denied generally the allegations of the complaint and alleged contributory negligence and unavoidable accident. A verdict by a jury resulted in favor of defendants. A motion for a new trial was denied. On this appeal, presented by other counsel than those who tried the case, plaintiffs contend: (1) that the verdict was against the weight of the evidence; (2) that the court should not have instructed the jury on contributory negligence and unavoidable accident; and (3) misconduct of counsel for defendant.

The accident occurred November 7, 1950, at about 6:30 p. m. It was dark. Plaintiffs were proceeding west on Orangethorpe Avenue toward Norwalk at about 30-35 miles per hour. They noticed some head-

lights approaching from the opposite direction which were from the truck owned by defendant company. As the cars passed each other something struck the windshield and top of plaintiffs' car and demolished it. The truck had a flat bed $7\frac{1}{2}$ feet wide and 9 feet long. It had a 15-foot crane boom loaded in the center of the truck extending from the cab to approximately $5\frac{1}{2}$ feet past the rear of the truck. After the impact defendants' truck stopped about 300 feet away from the point of impact and it was then noted that the chain holding the crane boom had become loosened and evidently was the object which had come in contact with plaintiffs' automobile. One of the chains on defendants' truck had a chain binder on it to fasten down the chain involved and the chain binder and handle extended about two inches over the left side of defendants' truck and down toward the pavement. The rear end of the jib was not lighted and no reflectors were placed on it. From the end of the chain binder handle to the ground was $33\frac{1}{2}$ inches. From a dent in the front and top of plaintiffs' left-hand fender on his car to the ground measured 35 inches. The truck was brought to the courthouse and exhibited to the jury and the defendant Willeford demonstrated the manner in which the chain and the chain binder were attached to the truck and how the jib was fastened to the truck so it could not move under ordinary circumstances. At the request of plaintiffs' attorney, Willeford demonstrated to the jury how the chain binder could have been knocked loose by contact with the left front fender of plaintiffs' automobile.

Willeford testified generally that after the chain binder was properly put in place and the load otherwise properly secured he and his assistant left Paramount, a few miles distant from where the accident occurred, and traveled at a speed of 40-45 miles per hour over paved roads until the alleged accident took place; that they checked the load on several occasions after they started on the trip; that his truck was at all times well on its own side of the center line of the roadway. He testified that there was a three-lane highway up to a distance of 300 feet from the point of acci-

dent and then it narrowed down to a two-lane highway as it crossed a narrow bridge 75 feet in length; that when about one-third of the way across the bridge traveling at about 40-45 miles per hour, he felt a jar as though his load had shifted on the truck; that he brought it to a stop on the east side of the bridge; that shortly thereafter the plaintiffs drove up from the west; that when he examined the load he found that the chain binder had been unlocked and it was loose and the chain on the front end of the boom was also loose; that the chains both on the front and rear end of the boom were still in place, but loose in such a manner that the boom could move from left to right on the truck body; that he replaced and refastened the jib boom and did not realize it had struck any object until plaintiffs informed him that it had struck their car.

It was defendants' contention at the trial that in passing, the left front fender of plaintiffs' Nash car struck the binder handle and loosened the chain, causing the boom to swing in front of plaintiffs' windshield, and by reason thereof the plaintiffs' injuries resulted.

It is the testimony of plaintiff Harry Freedman that the point of collision was not on the bridge but about 300 feet west of it, where the three-lane highway existed; that the truck was in the south lane and his car was proceeding in the north lane, and that when they passed each other they were at least 12 feet apart and that the boom was extending across this center lane when the driver's side of his windshield collided with it, breaking the glass and injuring the top of his car and causing him and his wife injuries.

A highway patrolman arrived at the scene, interviewed the parties, and concluded that the point of impact was at the west entrance of the bridge which narrowed down to two lanes of approximately nine feet each.

In answer to a question propounded to Willeford by counsel for defendants, he stated that he did not know whether or not the cause of the loosening of the chain and binder in its locked position was from rough

roads or not, but it could have been from contacting the binder by the fender of the plaintiffs' car approaching from the opposite direction. Counsel for plaintiffs cross-examined him on this subject and asked the witness if, under the facts related by him, considering the speed of the two vehicles and time element, the boom could swing out and strike the windshield of plaintiffs' car, and the witness answered that he did not know about that but that it might do so. Counsel for plaintiffs then propounded a similar question to the highway patrolman and he replied that it was his opinion that it would hardly be possible and stated his reason for so believing.

This was the main subject of contention of respective counsel at the trial and in the argument to the jury, which argument bore on the question of the negligence of defendants and the contributory negligence of plaintiffs.

[1,2] In a deposition taken of plaintiff Mr. Freedman, he testified that his car did not strike any portion of the truck or its equipment as it was fully 12 feet from it when he passed it. He further testified that his car had no marks on it other than the usual unobservable scratches found on any car. When photographs of the Nash were produced in court they clearly showed a heavy indentation near the front and on the top of the fender of the Nash car, and when it was called to Freedman's attention at the trial he then stated for the first time that he remembered his son was in an accident a few months before this and that the car had been repaired excepting this portion of the fender. He claimed that he had obtained estimates on its repair from certain individuals but was unable to locate them at the time of trial. The case went to the jury on the issues thus presented. Unquestionably, there was a conflict in the evidence as to whose negligence caused the accident. The question of plaintiffs' contributory negligence was properly submitted to the jury. While the sufficiency of the evidence to warrant the giving of an instruction on unavoidable accident may be questioned, the giving of such an instruction, under the circumstances, was not prej-

udicial error. *Parker v. Womack*, 37 Cal. 2d 116, 230 P.2d 823; *Astone v. Oldfield*, 67 Cal.App.2d 702, 708, 155 P.2d 398. The question of defendants' liability for the injuries claimed to have been suffered by plaintiffs might well have been disposed of by the ultimate finding of the jury in respect to their contributory negligence. However, in connection with the claimed injuries sustained the jury no doubt was not too favorably impressed with plaintiffs' claim. The amount of damages sought was \$50,000, for injuries to both plaintiffs. At the trial it was stated that the wife's injuries were only superficial cuts of her hands in brushing the glass from her lap. Neither party claimed any personal injury at the time of the accident other than superficial cuts from glass on Mr. Freedman's scalp. They drove their car away that evening. Later, Mr. Freedman went to two doctors and complained of eye disorder, loss of hearing, back injuries, nervousness, etc. These doctors testified that there were no eye injuries traceable to this accident and no particular permanent injuries found except that Mr. Freedman did complain of loss of hearing due to a bump on his head; that they did not find any evidence of head injury but found that he was hard of hearing and that they did not know if he was so afflicted before the accident.

In Mr. Freedman's deposition he testified there was no impairment in his hearing prior to the accident, excepting a partial loss of hearing many years prior to it but that it soon cleared up and that he never wore a hearing aid. At the trial defendants produced plaintiff's own insurance agent who testified that Harry Freedman was always hard of hearing and that he saw no difference between his former condition and that subsequent to the accident. It was brought out to the trial that Freedman had made a claim, in his name, through this agent, for the loss of a hearing aid, as being stolen from his car just a sort time before the accident. Freedman then claimed that this hearing aid belonged to a dead relative and that he made the claim for its loss in her behalf. He produced certain customers who claimed his hearing was not im-

paired prior to this accident. Counsel for plaintiffs attacked the veracity of this insurance agent (Mr. Boyd) before the jury, and at one point became so convinced as to his belief that he was testifying falsely that he remarked: "People don't act like Mr. Boyd. You cannot, any, any one of you, think of anything close to you, and you find anyone who would have handled this situation who was on the level, as Mr. Boyd did. Then I say give a defense verdict, give a defense verdict." The effect of the suggestion, as we interpret it, was that if the jury did believe Boyd, it should give a defense verdict. This may have been the answer to the suggestion. If so, plaintiffs' counsel should not be heard to complain.

Counsel for defendants did suggest that if the jury did find defendants negligent and plaintiffs free from contributory negligence, the verdict should be for the costs of repair of the car and for such injuries as plaintiffs may have clearly established, and suggested an amount not to exceed \$500. It would appear, therefore, that the jury concluded that the plaintiffs had not met the burden of proving negligence or that defendants had established contributory negligence on the part of plaintiffs.

The claimed misconduct of counsel for defendants consists in certain statements he made to the jury after counsel for plaintiffs, who tried the case, made some uncomplimentary remarks about Mr. Boyd to the jury, wherein he stated that he thought Boyd was "the kind of man that a few dollars will influence", and intimated, at least, that counsel for defendants or "somebody" must have made it "worth while" in order that he would so testify.

In reply, counsel for defendants made certain statements which ran, in general, as follows:

"It's sort of hard to sit here to have a man like this fellow here say things to you at a place where he can get away with it, or say things about you that he wouldn't dare say down in the alley back of my house, or that he wouldn't dare say over in Boyd's office, because I don't know whether I could do it or not, but I know very well that Boyd

could certainly throw him clear across the street and bounce him on his head a couple of times, which he just exactly very richly deserves. * * * That fellow is talking to you from the depths of a cesspool, which is the way he thinks, apparently."

In their reply brief, counsel for defendants stated that present counsel for plaintiffs on this appeal did not fully understand the "most unsavory atmosphere of the court room at the time" but "Looking back upon the entire procedure now, after a cooling off period of several months, counsel for defendants must admit that some of the remarks and statements made by him are not to be used as models or illustrations for law students on the subject of how a lawyer should conduct himself in court." Counsel for plaintiffs may well have made a similar concession.

[3] It is readily apparent that while certain comments of defendants' counsel may well be termed acrimonious, intemperate and wholly unnecessary, the same observation applies with equal force to the comments of plaintiffs' counsel. The entire case appears to have been tried in an atmosphere of decidedly heated advocacy. However, we cannot say that under the circumstances the comments were so prejudicial and uninvited as to warrant this court in reversing the judgment, particularly where, in no instances brought to the attention of this court, did counsel for plaintiffs make any objection nor did he assign such statements as misconduct or ask the jury to disregard them. By proper instruction the court told the jury that it should not consider as evidence any statement made by counsel on either side, and that it must decide the case upon its merits and the evidence produced. On a motion for new trial all these claims were presented and the trial court denied the motion. No prejudicial error appears and no abuse of discretion is reflected in the record.

Lastly, defendants claim that the appeal, insofar as it affects the judgment rendered in favor of defendant Raymond Eugene Willeford, is moot. This claim is based on the notice of appeal, which recites: "To

Raymond Eugene Willeford et al., and to * * * his attorneys: Notice is hereby given that the plaintiffs * * * hereby appeal * * * from the judgment heretofore made herein and entered herein on the 16th day of April, 1952 * * * in favor of the defendant, Raymond Eugene Willeford." No mention is made therein of the remaining defendant or defendants, employers of Willeford, in whose favor the judgment also ran. However, the notices to the clerk, reporter and defendant Willeford et al. recite that "plaintiffs have appealed from the judgment * * rendered therein". Plaintiffs claim that the omission of the words "et al." after Willeford's name in the body of the notice of appeal was a clerical error. Since the notice of appeal is "from the judgment entered * * * on the 16th day of April, 1952", we feel charitable enough to believe that plaintiffs intended to appeal from the entire judgment and not limit it to that portion pertaining to the driver, Willeford, and since the judgment must be affirmed on the grounds stated, no further consideration will be given to this point.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



121 Cal.App.2d 75

SCHULZE v. SCHULZE.

Civ. 19408.

District Court of Appeal, Second District,
Division 3, California.

Nov. 4, 1953.

Action by wife for installments accrued under foreign judgment for separate maintenance. The Superior Court, Los Angeles County, Daniel N. Stevens, J., entered summary judgment for plaintiff and defendant appealed. The District Court of Appeal, Vallée, J., held that husband's ad-

mission, by failure to deny, that installments which had accrued under the judgment had not been paid, left no triable issue of fact as to such installments, and summary judgment for wife was warranted.

Affirmed.

1. Judgment ⇨186

On motion for summary judgment, trial court's duty is to determine whether plaintiff or defendant has presented any facts which give rise to a triable issue or defense, not to pass upon or determine the issue itself. Code Civ.Proc. § 437c.

2. Judgment ⇨185

A summary judgment for a plaintiff is proper only if affidavits in support of his motion state facts which if proved would be sufficient to sustain judgment in his favor and defendant does not by affidavit show such facts as may be deemed sufficient to present a triable issue of fact. Code Civ.Proc. § 437c.

3. Judgment ⇨185

An affidavit does not raise a triable issue of fact such as would preclude summary judgment unless it states facts showing that the party has a good and substantial defense to action, or that a good cause of action exists upon the merits. Code Civ.Proc. § 437c.

4. Judgment ⇨181(20)

In action by wife for installments accrued under foreign judgment for separate maintenance, husband's admission, by failure to deny, that installments which had accrued under the judgment had not been paid, left no triable issue of fact as to such installments, and summary judgment for wife was warranted. Code Civ.Proc. § 437c.

5. Estoppel ⇨68(4)

In action by wife for installments accrued under foreign judgment for separate maintenance, where, at time of hearing on wife's first motion for summary judgment, husband claimed that a subsequent judgment of divorce superseded the judgment for separate maintenance and that by reason thereof he had a good defense to the complaint, on strength of which the motion

was denied, husband was estopped, upon wife's second motion for summary judgment after filing of supplemental complaint, from claiming that the judgment of divorce was void.

6. Estoppel ⇐63

One to whom two inconsistent courses of action are open, and who elects to pursue one of them, is afterward precluded from pursuing the other.

7. Appeal and Error ⇐93

An order denying motion for summary judgment is not appealable, but a judgment entered on an order granting the motion is appealable. Code Civ.Proc. §§ 437c, 963.

8. Judgment ⇐569

An order denying motion for summary judgment is not a final judgment and does not determine any issue, but its effect is merely a finding that there is an issue of fact to be tried. Code Civ.Proc. § 437c.

9. Judgment ⇐713(2)

An existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties thereto, and of their privies, which were or might have been determined.

10. Judgment ⇐564(1)

Application of principle of res judicata in a given case depends in part upon an affirmative answer to question whether there was a final judgment on the merits.

11. Judgment ⇐569

Order denying plaintiff's motion for summary judgment made on original complaint was not a final judgment, and was not res judicata of plaintiff's subsequent motion for summary judgment made after filing of a supplemental complaint.

crued under a foreign judgment for support and maintenance.

On March 30, 1950, the circuit court of Cook County, Illinois, having jurisdiction of the defendant, granted plaintiff a judgment for separate maintenance in which it decreed that: 1. Under an order made in the action on August 4, 1949, there was \$2,660 due and owing from defendant to plaintiff for her support and maintenance and \$200 for her attorney's fees; 2. Defendant pay the same to plaintiff; 3. Defendant pay plaintiff \$60 a week for her separate support and maintenance until further order of the court; 4. Defendant pay plaintiff the rent of her apartment in Chicago in the sum of \$105 a month until further order of the court; 5. Defendant pay plaintiff an additional attorney's fee of \$500.

On October 2, 1950, plaintiff filed the complaint in the present action in the superior court of the County of Los Angeles in which she alleged: The terms of the Illinois judgment for separate maintenance; no part of the sums therein ordered to be paid to plaintiff had been paid except \$100; there were due and owing from defendant to plaintiff \$4,511 for support and maintenance and for rent of her apartment and \$700 for attorney's fees; and the judgment had not been modified. Plaintiff prayed that the Illinois judgment be established as a judgment of the superior court of this state; judgment for \$4,511 and \$700 against defendant; defendant be ordered to pay plaintiff \$60 a week for her support and maintenance and \$105 a month for the rent of her apartment in Chicago.

On October 20, 1950, defendant filed an answer in which he denied for want of "sufficient information and knowledge" the allegations of the complaint with the respect to the Illinois decree, admitted he had paid plaintiff only \$100 and denied any sum was due or owing to plaintiff. As a separate defense and as a cross-complaint, defendant alleged facts for the purpose of showing a change of circumstances after the rendition of the Illinois judgment. He prayed that: 1. Plaintiff take nothing; 2. If the court recognize and establish the Illinois judgment, it supersede the provi-

Alfred M. Klein, Los Angeles, for appellant.

Hahn, Ross & Saunders, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from a summary judgment in an action for installments' ac-

sions thereof for the support and maintenance of plaintiff and render judgment relieving him from further payments. Plaintiff answered the cross-complaint denying its allegations generally for want of information and belief.

On May 11, 1951, plaintiff made a motion for a summary judgment. In support thereof she made and filed an affidavit in which she set forth the same facts as alleged in her complaint. In opposition thereto, defendant made and filed an affidavit in which he stated facts for the purpose of showing a change of circumstances after the rendition of the Illinois judgment. He also stated that within the preceding two months plaintiff had filed a petition in the circuit court of Cook County, Illinois, in the action in which the judgment for separate maintenance had been rendered, praying that that judgment be changed to one of divorce. Defendant also filed in opposition to the motion an affidavit by his attorney in the present action, which incorporated therein exemplified copies of a supplemental complaint for divorce and a judgment of divorce in the Illinois action. The judgment recites that "due notice for leave to file the Supplemental Complaint in Chancery for Divorce was given to Milton K. Joseph, Esq., one of the attorneys of record for the defendant in this cause, who personally appeared in court on April 18th, 1951; and thereupon the court ordered that the defendant answer or otherwise plead to said Supplemental Complaint in Chancery for Divorce within thirty (30) days thereafter, as will more fully appear from the order of this court entered on April 18th, 1951; and it also appearing to the court that on May 23rd, 1951, this cause came on to be heard upon the motion of the defendant to dismiss plaintiff's Supplemental Complaint in Chancery for Divorce; and that the court, thereupon, having considered the motion of the defendant to dismiss plaintiff's supplemental Complaint for Divorce and the pleadings on file, and having heard the arguments of the respective counsel for and in opposition of the motion to dismiss, it denied defendant's motion to dismiss." In the judgment of divorce, the court found that \$8,550 was due from defendant to plaintiff and decreed

that defendant pay \$50 a week for permanent alimony and support and \$350 additional attorney's fees and that defendant pay plaintiff \$7,850, "the amount found to be due to the plaintiff from the defendant, for her support and rent to date under this decree." The affidavit stated that the judgment of divorce "superceded and replaced" the judgment for separate maintenance "upon which the present action is based." Plaintiff made and filed a counter affidavit stating facts for the purpose of showing no change of circumstances.

On July 19, 1951, the motion for a summary judgment was denied on the ground the judgment for separate maintenance had been superseded by and merged in the judgment of divorce.

On October 30, 1951, plaintiff was granted leave to, and she filed a supplemental complaint denominated by stipulation as an amended and supplemental complaint, referred to hereinafter as the supplemental complaint. The supplemental complaint alleged the filing of the complaint for separate maintenance; the rendition of the judgment for separate maintenance; the judgment of divorce and that by its terms plaintiff was awarded judgment against defendant for \$8,900, no part of which had been paid. The prayer was for judgment against defendant in that amount and interest.

Defendant answered the supplemental complaint admitting he had been served with summons in Illinois in the action for separate maintenance; denying that the circuit court of Cook County, Illinois, had jurisdiction of him "in any Supplemental Complaint for Divorce or of the subject matter" referred to in the supplemental complaint, and denying that any sum was owing to plaintiff. As a separate defense defendant alleged that no summons was ever issued "in connection with said Supplemental Complaint for Divorce"; a copy of said supplemental complaint was never served on him, nor "was he ever duly served personally with process of said Supplemental Complaint for Divorce," nor did he personally appear or plead thereto, or authorize any appearance or plea to be made or entered thereto on his behalf; the Illinois

court did not obtain jurisdiction either of the cause of action or of the defendant sufficient to enable it to legally render "any such Decree of Divorce." As a further defense the answer alleged that the judgment for separate maintenance was on a single cause of action and disposed of all the issues made in the complaint therefor; that the court did not reserve jurisdiction for any purpose except to carry the judgment into effect; that by that judgment the Illinois court lost jurisdiction of the action and of the defendant for any purpose other than "to carry out" the judgment for separate maintenance, and did not have or retain jurisdiction to entertain a new and separate cause of action for divorce; consequently, all proceedings subsequent to the judgment for separate maintenance including the judgment for divorce are null and void.

On November 30, 1951, plaintiff moved for a summary judgment. In support thereof, she made and filed an affidavit in which she stated all of the facts alleged in the supplemental complaint. She also filed an affidavit by her attorney in this action, which stated that the record of the Illinois action revealed that a motion to dismiss the supplemental complaint for divorce was filed therein by one of the attorneys who had appeared for defendant in the action prior to the judgment for separate maintenance, which motion was based on the following grounds: 1. The original complaint was for separate maintenance; the judgment for separate maintenance finally and completely adjudicated the single cause of action stated in the complaint; the judge did not reserve jurisdiction for any purpose except to carry the judgment into effect. 2. By virtue of the judgment for separate maintenance, the Illinois court lost jurisdiction of the cause for any purpose other than "to carry out" the judgment; the Illinois court lacks jurisdiction to entertain a new and separate cause of action as prayed for in the supplemental complaint therefor. 3. Defendant, therefore, asks that the supplemental complaint be dismissed for want of jurisdiction. The affidavit further stated the record of the Illinois action reveals an order was made by the Illinois court deny-

ing defendant's motion to dismiss and entering his default for failing to answer or otherwise plead to the supplemental complaint for divorce; that thereafter a motion was filed in the Illinois action by counsel for defendant requesting "that the Order heretofore entered herein on May 23, 1951, overruling defendant's Motion to dismiss plaintiff's Supplemental Complaint for Divorce and all subsequent orders be vacated and set aside"; that the "Order entered May 29, 1951, setting for hearing on June 5, 1951, plaintiff's Supplemental Complaint for Divorce" and the "Decree for Divorce entered June 8, 1951," be vacated for want of jurisdiction, and that an order was made by the Illinois court denying this motion.

On April 11, 1952, the court, in the present action, made an order which provided that if plaintiff within a specified time filed her consent in writing to the entry of judgment for \$5,211 on the judgment for separate maintenance, the motion for summary judgment would be granted in that amount, and if such consent was not filed, that the motion would be denied. Plaintiff filed her written consent and judgment for \$5,211 was entered. Defendant appeals.

[1-4] The issue to be determined by the trial court in considering a motion for a summary judgment is whether plaintiff or defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself. *Eagle Oil & Ref. Co. v. Prentice*, 19 Cal.2d 553, 555, 122 P.2d 264; *U. S. Fidelity & Guar. Co. v. Sullivan*, 93 Cal.App.2d 559, 561, 209 P.2d 429. A summary judgment for a plaintiff is proper only if the affidavits in support of his motion state facts which if proved would be sufficient to sustain judgment in his favor and defendant does not "by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." Code Civ. Proc. § 437c, *Hardy v. Hardy*, 23 Cal.2d 244, 245-247, 143 P.2d. 701. An affidavit does not raise a triable issue of fact unless it states "facts showing that the party has a good and substantial defense to the plaintiff's action * * * or that a good cause of action exists upon the merits." Code

Civ.Proc. § 437c; *Hardy v. Hardy*, supra, 23 Cal.2d at pages 246-247, 143 P.2d at page 703. As will appear, in view of plaintiff's consent to a judgment for \$5,211, the affidavits in support of the motion state facts which, if proved, are sufficient to sustain the judgment in plaintiff's favor; and the affidavit of defendant does not state any facts showing he has any defense to the action.

The cause of action alleged in the supplemental complaint is for \$7,850, accrued installments under the judgment for separate maintenance, and \$1,050 ordered to be paid by the judgment for divorce. The supplemental complaint eliminated the prayer of the original complaint that the Illinois judgment for separate maintenance be established as a judgment of the superior court of this state and eliminated the prayer for future support. Defendant's assertion that "the issue of the separate maintenance decree was not within either the allegations nor the prayer" of the supplemental complaint is contrary to the fact. The supplemental complaint specifically alleged the granting of the judgment for separate maintenance; by reference, alleged the judgment of divorce in which the Illinois court found the facts with respect to the judgment for separate maintenance; and prayed for judgment for a sum of money which included the accrued installments under that judgment. Defendant in his answer to the supplemental complaint admitted these facts by failure to deny them. Since defendant in his answer to the supplemental complaint admitted that the installments which had accrued under the judgment for separate maintenance had not been paid, and inasmuch as he did not in his affidavit state otherwise, there was no triable issue as to such installments.

Defendant contends that his affidavit raised a triable issue as to the authority of the attorney in Illinois to act for him after rendition of the judgment for separate maintenance and as to the jurisdiction of the Illinois court to render a judgment of divorce in the same action in which a final judgment for separate maintenance had been rendered. These questions were not relevant. There was no such triable

issue raised as to the installments which had accrued under the judgment for separate maintenance. The summary judgment was not predicated on the accrued installments under the judgment of divorce; it was based on installments which defendant did not deny had accrued under the judgment for separate maintenance.

[5,6] There is another reason why defendant may not claim that the judgment of divorce is void for want of authority in the Illinois attorney to appear for him or for want of jurisdiction in the Illinois court. At the time of the hearing on the first motion for a summary judgment prior to the filing of the supplemental complaint, his counsel in the present action made and filed an affidavit in opposition to the motion in which he relied on the judgment of divorce. He said in the affidavit that the judgment of divorce "superseded and replaced" the judgment for separate maintenance, and that by reason thereof he had "a good and substantial defense to the present complaint." On the strength of that affidavit the motion was denied, the court stating in its order that it found the judgment for separate maintenance has been superseded by and merged in the judgment of divorce. On the motion for a summary judgment after the filing of the supplemental complaint, from which judgment this appeal was taken, defendant made and filed an affidavit in opposition to that motion in which he stated facts in an attempt to show that the attorney who appeared in the Illinois action after the filing of the supplemental complaint for divorce did so without authority and that the Illinois court had no jurisdiction to render the judgment of divorce. The defendant may not play fast and loose with the court in this fashion. He cannot in one breath say the judgment is valid,—obtain relief thereby; and in the next, say it is invalid. Having relied on the validity of the judgment of divorce on the first motion, he is estopped from thereafter claiming it is void. One to whom two inconsistent courses of action are open and who elects to pursue one of them, is afterward precluded from pursuing the other. *Steiner v. Rowley*, 35 Cal.2d 713, 720, 221 P.2d 9; *Austin v.*

Hallmark Oil Co., 21 Cal.2d 718, 727, 134 P.2d 777; Alexander v. Hammarberg, 103 Cal.App.2d 872, 878-879, 230 P.2d 399; Steiner v. Thomas, 94 Cal.App.2d 655, 660; Calhoun v. Calhoun, 81 Cal.App.2d 297, 305, 183 P.2d 922; Monroe v. Owens, 76 Cal. App.2d 23, 27, 172 P.2d 110; Sacramento etc. Dist. v. Pac. Gas & Electric Co., 72 Cal.App.2d 638, 649, 165 P.2d 741; Garnette v. Mankel, 71 Cal.App.2d 783, 787, 163 P.2d 466; 10 Cal.Jur. 646, § 26.

[7,8] Lastly, defendant urges that the order denying the motion for a summary judgment on the original complaint is res judicata and that therefore the order granting the motion on the supplemental complaint was in error. An order denying a motion for a summary judgment is not appealable. A judgment entered on an order granting the motion is appealable. Code Civ.Proc. §§ 437c, 963.¹ An order denying the motion does not determine any issue. Its effect is merely a finding that there is an issue of fact to be tried. It is otherwise, if the motion is granted. A final judgment for the moving party follows. Denial of the motion is not a final judgment; it is not a final decision on the merits. The order denying the motion on the original complaint merely determined that on the pleadings as they existed at that time there was triable issue.

[9,10] The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties thereto and of their privies which were or might have been determined. French v. Rishell, 40 Cal.2d 477, 479, 254 P.2d 26; Dillard v. McKnight, 34 Cal.2d 209, 213, 209 P.2d 387, 11 A.L.R.2d 835; Bliss v. Security-First Nat. Bank, 81 Cal.App.2d 50, 58, 183 P.2d 312. The application of the principle in a given case depends in part upon an affirmative answer to the question: Was there a final judgment on the merits? Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; Dillard v. McKnight, supra, 34 Cal.2d at page 214, 209

P.2d 387, 11 A.L.R.2d 835; Citizens Nat. Trust & Savings Bank v. Hawkins, 87 Cal. App.2d 535, 541, 197 P.2d 385; Estate of Eaton, 38 Cal.App.2d 180, 182-184, 100 P.2d 813.

[11] Since the order denying the motion for a summary judgment made on the original complaint was not a final judgment, it is not res judicata.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.



KESLER et al. v. PABST.*

Civ. 15560.

District Court of Appeal, First District,
Division 1, California.

Nov. 3, 1953.

As Modified on Denial of Rehearing

Dec. 3, 1953.

See 264 P.2d 42.

Action by husband and wife for injuries and damage to automobile sustained in intersectional collision. Subsequent to accident husband relinquished to his wife as separate property all claim to damages recoverable by her. The Superior Court of the County of San Mateo, Murray Draper, J., refused plaintiffs permission to file amended complaint pleading the agreement, and rendered judgment for defendant and plaintiffs appealed. The District Court of Appeal, Bray, J., held that where husband relinquished his right to his claim for wife's damages, alleged contributory negligence of the husband was not imputable to his wife, and it was improper for trial court to refuse to allow wife to amend her complaint.

Judgment in favor of defendant against plaintiff wife for general damages reversed, and balance of judgment affirmed.

Petition for rehearing denied.

* For the history of the origin and effect of summary judgment statutes see Fish-

er v. Sun Underwriters Ins. Co., 55 R.I. 175, 179 A. 702, 103 A.L.R. 1097.

* Subsequent opinion 273 P.2d 257.

1. Husband and Wife Ⓒ260**Negligence** Ⓒ89(2)

In absence of an agreement to contrary, cause of action for personal injuries of either spouse, and any recovery of damages thereon are community property, and contributory negligence of one spouse must be imputed to and will bar recovery by the other. Civ.Code, § 171c.

2. Husband and Wife Ⓒ266

A husband can relinquish to his wife all claim to cause of action which she may have for injuries to her person, and to damages she may receive therefrom, and this relinquishment may be made either before or after the accident upon which the cause of action is based occurs. Civ.Code, § 171c.

3. Negligence Ⓒ93(2)

Where husband and wife sustained injuries in automobile collision, and after the accident, husband relinquished to his wife as separate property all claims to damages recoverable by her, husband no longer had interest in wife's recovery, and the husband's negligence was not imputable to the wife on her claim for personal injuries. Civ.Code, §§ 171c, 3510.

4. Trial Ⓒ260(7)

It was not improper for court to refuse to instruct that motorists have duty to anticipate meeting other vehicles, and to exercise vigilance and control at all times, where court instructed that driver is required to be vigilant at all times, keeping a lookout for traffic and other conditions to be reasonably anticipated.

5. Trial Ⓒ260(8)

Where court, in action for personal injuries sustained in automobile collision, discussed situation when drivers of two automobiles want immediate use of same place on a highway, it was not improper for court to strike paragraph of proposed instruction to the effect that driver on through highway must make ordinary use of faculties, and that motorist entering a main highway does not do so at his peril.

6. Trial Ⓒ260(1)

A party may not complain that court did not instruct in language requested by him if subject matter is substantially incorporated in instructions given.

7. Automobiles Ⓒ245(14)

In action for injuries sustained in nighttime intersectional automobile collision, where defendant motorist testified that he had clear view of intersection for about 250 yards, and that he first saw plaintiffs' automobile when he was 65-70 feet from intersection, whether defendant was negligent in failing to see lights of plaintiffs' automobile in time to avoid collision was question for the jury.

William A. Sullivan, San Francisco, for appellants.

Partridge, O'Connell & Whitney, San Francisco, for respondent.

BRAY, Justice.

In an action for damages for personal injuries, both plaintiffs appeal from a judgment in favor of defendant.

Questions Presented:

1. Where subsequent to an accident the husband relinquishes to the wife as separate property all claim to damages recoverable by her, is the husband's negligence in that accident imputable to the wife?

2. Did the court err in refusing certain instructions?

3. Was defendant negligent as a matter of law?

Record.

The action was brought originally by Bertha Kesler and Walter Kesler, husband and wife, and Fontnelle I. Blanchard and E. G. Blanchard, husband and wife, all of whom except E. G. Blanchard were riding in the car driven by Walter and were injured in the collision with defendant's car. There were other defendants but the action was dismissed as to them. Defendant settled with the Blanchards and their causes of action were dismissed, leaving one cause of action by Bertha for damages for her injuries and one cause of action by Walter for the value of his car and for damages for loss of services, etc., of the wife. Defendant answered, pleading contributory negligence of the husband and such negligence imputed to the wife. Thereafter plaintiffs entered into a property settle-

ment agreement in which Walter relinquished all claim and causes of action for the injuries suffered by Bertha in the accident and her expenses in connection therewith and agreed that Bertha's cause of action herein and any recovery therefrom should be her sole and separate property.

Plaintiff Bertha moved for permission to file an amended complaint pleading the agreement. The court denied the motion. At the trial Bertha renewed the motion and it was again denied. However, the court permitted her to amend to increase the amount of damages asked for and permitted Walter to eliminate his claim for damages for loss of the wife's services, and to reduce the amount prayed for in his cause of action. The agreement was admitted in evidence and read to the jury but the court refused to instruct that, in view of the agreement, any contributory negligence of Walter could not be imputed to Bertha. On the contrary, the court instructed that it should be. Bertha's motions for an instructed verdict and judgment notwithstanding the verdict were denied.

The accident occurred at the intersection of Bayshore Highway and Cypress Avenue. Plaintiff Walter was driving his automobile in which plaintiff Bertha and Mrs. Blanchard were riding, westerly across the intersection. His car was struck as he reached the westerly lane of Bayshore by a car driven southerly by defendant. As no attack is made on the sufficiency of the evidence it is unnecessary to detail the facts of the collision. Admittedly the evidence would support a finding either way on contributory negligence. While the jury could have found that defendant was not negligent, the evidence would have supported a contrary finding. For the purposes of this appeal we must assume that the jury found Walter contributorily negligent and imputed his negligence to Bertha.

1. Effect of the Agreement.

[1] It is the general rule in California that in the absence of an agreement to the

contrary the cause of action for personal injuries of either spouse and any recovery of damages thereon are community property, and that contributory negligence of one spouse must be imputed to and will bar recovery by the other. *Zaragoza v. Craven*, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461; *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922; 10 Cal.Jur.2d § 31, p. 698, § 32, p. 699.¹ The reason for imputing negligence of the husband to the wife is that the recovery for her injuries is community property in which the husband shares, and therefore the law will not permit him to benefit by his own wrong. *Basler v. Sacramento Gas & Elec. Co.*, 158 Cal. 514, 111 P. 530. In *Franklin v. Franklin*, 67 Cal.App.2d 717, 722, 155 P.2d 637, there is language to the effect that a husband's cause of action for damages for his personal injuries is not community property although the money, if recovered during the existence of the marriage, would be community property. This statement is contrary to the rule set forth in all the other cases on the subject since 1913. See, among others, *Johnson v. Hendrick*, 45 Cal.App. 317, 321, 187 P. 782; *Sanderson v. Niemann*, 17 Cal.2d 563, 567, 569, 110 P.2d 1025; 10 Cal.Jur.2d § 31, p. 698. The statement was expressly disapproved in *Zaragoza v. Craven*, supra, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461.

[2] Under our law there can be no doubt that a husband can relinquish to the wife all claim to the cause of action which she may have for injuries to her person and to the damages she may receive therefrom, and this relinquishment may be made either before or after the accident upon which the cause of action is based occurs. *Perkins v. Sunset Tel. and Tel. Co.*, 155 Cal. 712, 720, 103 P. 190. See also *Zaragoza v. Craven*, supra, 33 Cal.2d 315, 322, 202 P.2d 73, 6 A.L.R.2d 461, where the court declined to discuss this rule, stating there was no evidence on the subject.

This, then, brings us to the vital question here—plaintiff husband having relinquished all claim to his wife's cause of

1. See section 171c, Civil Code, added in 1951, which gives the wife control, with certain exceptions, of money damages

received by her for personal injuries suffered by her.

action and damages, and therefore, the reason given for the rule requiring a husband's contributory negligence to be imputed to the wife having ceased, does not the rule cease? "When the reason of a rule ceases, so should the rule itself." Civ.Code, § 3510. We conclude that it does. The precise question has not been passed on in this state, although *Flores v. Brown*, 39 Cal.2d 622, 248 P.2d 922, comes very close to doing so. There Herman Flores and his minor son were killed in a collision between an automobile driven by Herman and the defendant's tractor. Although the issue was not properly presented, there was evidence from which the jury could have found that the father survived the son. Mrs. Flores brought suit for damages for the wrongful death of the son. Defendant, relying on the rule that a cause of action for the wrongful death of a minor child or for damages suffered by the parents because of injury to such child is community property of the parents, and that ordinarily it is necessary to impute the negligence of one spouse to the other, see 39 Cal.2d page 630, 248 P.2d page 926, contended that the father survived the child and that the father's negligence was imputable to the wife. The wife also sued for her own personal injuries and the defendant also contended that as to these, the husband's negligence should be imputed to her. The court held that due to Herman's death he would receive no unjust enrichment and that his negligence could not be imputed as to either cause of action. The defendant contended, as does the defendant here, that the rights of the parties arising out of an accident must be determined as of the time the cause of action arises. As to this contention the court held, in effect, that it was not the rights of the parties at the time of the accident with which the courts were concerned but their rights at the time of trial. "Undoubtedly, convenience and certainty in litigation would be served if facts occurring after the accrual of a cause of action could be ignored, but benefits so achieved would be far outweighed by the hardship and injustice of applying

a rule designed to prevent unjust enrichment after the reason for it has ceased to exist. See Civ.Code § 3510. When the husband is dead, not only is the reason for the rule imputing his negligence to his wife gone, but to apply it defeats its own purpose. It is but a windfall to a defendant who negligently injures a wife or causes the death of a minor child that recovery may be barred because the wife's husband was also negligent. Although allowing the negligent defendant to escape liability has been considered a lesser evil than allowing the negligent spouse to profit from his own wrong, surely the former evil may not be balanced by the latter when the latter is no longer present." 39 Cal.2d pages 631-632, 248 P.2d page 927.

We can see no difference between a situation where because of the death of the husband he no longer has an interest in her recovery and one where by a relinquishment he no longer has such interest. As in the first situation, his negligence is no longer imputable to his wife, so in the second situation it cannot be imputable either. Nor can the defendant complain of such a rule. Had the husband prior to an accident relinquished all claim to injuries which his wife might receive should an accident occur, defendant could not raise against her the defense of imputable negligence of the husband. Defendant should not then have the benefit of the defense called a "windfall" in the *Flores* case, *supra*, when at the trial it is found that the husband, so far as interest in the wife's recovery is concerned, is in the same situation he would have been had he made a relinquishment prior to the accident.

It should be noted that California's general rule that contributory negligence of one spouse bars a recovery by the other for his or her own bodily harm, is contrary to the majority rule. See Restatement of Torts, § 487, and 24 Cal.Law Rev. 740.

[3] The trial court should have allowed the amendment to the complaint pleading the relinquishment, and erred in instructing the jury that Walter's negligence, if any, was imputable to Bertha.

2. Other Instructions.

Because of plaintiff Walter's appeal, the instructions will be considered. It is contended that the court erred in refusing to give two of their instructions and in striking out one paragraph in a third, contending that thereby plaintiffs' theory of the case was not presented to the jury.

[4-6] The first proposed instruction referred to the general duty of all motorists to anticipate meeting other vehicles and to exercise vigilance and control at all times. This was covered by the court's instruction requiring a driver to be vigilant at all times keeping a lookout for traffic and other conditions to be reasonably anticipated, etc. Plaintiffs proposed an instruction incorporating certain sections of the Vehicle Code dealing with the rights of the driver entering a main highway after stopping at its entrance. The court struck from it an additional paragraph to the effect that a driver on a through highway must make ordinary use of his faculties and that a motorist entering a main highway does not do so at his peril. The court at some length discussed the situation when the drivers of two vehicles want the immediate use of the same place on the highway. While the instructions given did not use the phrase to the effect that the highway entering motorist does not enter at his peril, they fully covered the subject. A party may not complain that the court did not instruct in the language requested by him if the subject matter is substantially incorporated in the instructions given. *Rednall v. Thompson*, 108 Cal.App.2d 662, 239 P.2d 693. The third proposed instruction was a resume of section 552 of the Vehicle Code, the whole of which section the court gave, plus a statement that the driver on an arterial highway is required to keep a proper lookout, a matter completely covered by the instructions given.

We have carefully examined all the instructions given and agree with the trial court's statement that the subject matter of plaintiffs' proposed instructions was fully covered by the instructions given.

3. Was Defendant Negligent as a Matter of Law?

[7] Plaintiff Bertha contends that the evidence demonstrates as a matter of law that defendant was negligent and hence that the trial court should have granted her motion for judgment notwithstanding the verdict and that we should remand the case for trial as to her on the question of damages only. This contention is based upon the testimony of defendant to the effect that he never saw the lights of plaintiffs' car, and the distance he was from the intersection when he first saw plaintiffs' car. He stated he had a clear view of the intersection for approximately 250 yards, and that he first saw plaintiffs' car when he was 65-70 feet from the intersection. At that time plaintiffs' car, coming from defendant's left, had reached approximately the center of Bayshore Highway. The accident took place after dark in the evening. In view of the circumstances shown in the evidence, including the lighting at the intersection and the fact that plaintiffs' car was coming into a lighted area from the side, we cannot say, nor could the trial court, that as a matter of law defendant could or should have seen the lights of plaintiffs' car or should have seen the car before he did. Those are matters for the jury.

That portion of the judgment in favor of defendant as against plaintiff Bertha for her general damages is reversed; the balance of the judgment is affirmed. Each party shall bear his own costs of appeal.

The petition for rehearing is denied.

PETERS, P. J., and FRED B. WOOD, J., concur.

121 Cal.App.2d 140

PEOPLE v. SILVERSTEIN.

Cr. 5033.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1953.

Hearing Denied Dec. 3, 1953.

Burglary prosecution. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction, and entered order denying new trial, and defendant appealed. The District Court of Appeal, Drapeau, J., held that proceeding in Juvenile Court was not a "criminal prosecution," and, therefore, subsequent prosecution for same offense which gave rise to Juvenile Court proceeding did not violate constitutional provision against double jeopardy.

Affirmed.

1. Criminal Law §168

Proceeding in juvenile court was not a "criminal prosecution," and, therefore, subsequent prosecution for same offense which gave rise to juvenile court proceeding did not violate constitutional provision against double jeopardy. Welfare and Institutions Code, §§ 700, 747, 749, 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Criminal Prosecution".

2. Criminal Law §168

Jeopardy, in either its constitutional or its common-law sense, has a strict application to criminal prosecutions only.

Umann & Bubrick, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

DRAPEAU, Justice.

In 1951 defendant, Irving Silverstein, burglarized a dwelling house in the nighttime. He was apprehended, charged under Subdivision m of Section 700 of the Welfare & Institutions Code with being a person who had violated the law of this state, made a ward of the Juvenile Court, and

committed to the California Youth Authority.

He was confined in Preston School of Industry and in the institution at Lancaster for fifteen months, and then released. Upon his release he was certified back to the Juvenile Court and then certified to the Superior Court for further proceedings.

On December 30, 1952 an information was filed in the Superior Court by the District Attorney, charging defendant with the same burglary, and with a prior felony conviction for which he had served time in the penitentiary in the State of Idaho.

Brought to trial on this charge, defendant waived a jury, and was found guilty of first-degree burglary by the trial judge. He was also found to have suffered the prior felony conviction and punishment.

Motion for a new trial was denied; probation was denied; and defendant was sentenced to the state prison for the term prescribed by law. Execution of judgment was suspended and defendant referred to the California Youth Authority. California Youth Authority rejected him. Then he was committed to the state prison in accordance with the judgment.

Defendant urges but one ground of appeal: That the trial in the Superior Court, the finding of guilty as charged in the information, and the sentence of defendant constitute a second punishment and a second trial for the same offense. This the State may not do. *Ex parte Lange*, 18 Wall. 163, 175, 85 U.S. 163, 21 L.Ed. 872; *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422; *People v. Bechtel*, 41 Cal.2d 441, 260 P.2d 31.

Appellant argues: That the Juvenile and the Superior Court are one and the same, and therefore defendant was dealt with twice by the same court for the same crime. That when the Juvenile Court made him its ward and committed him to the Youth Authority he had been "punished." That when the proceedings were subsequently commenced in the Superior Court constitutional rules of double jeopardy applied to defendant, and he should have been discharged by the Superior Court.

The Attorney General contends that Juvenile Court proceedings are civil, not criminal in nature; that commitments ordered by the Juvenile Court are not "punishments"; and that therefore double jeopardy, which applies only to criminal cases, is not applicable to the facts in this case.

The problem is not difficult of solution if the purposes of our Juvenile Court law be kept in mind.

One of these purposes is to save minors from the rigors of the criminal law. Subd. m, § 700, Welf. & Inst. Code; and Cf. *People v. Kehoe*, 123 Cal. 224, 55 P. 911.

Having regard for the lack of judgment of some boys and girls who commit felonies, knowing that in such cases want of training is largely responsible for their crimes, our juvenile court law attempts first to save them from the harsh consequences of their folly—from the degradation of confinement in a penitentiary, from the infamous associations incident to such confinement, and from bearing all the rest of their lives the stigma of ex-convict.

Then our law attempts to provide through its Youth Authority the training which it hopes will enable the minor to learn to distinguish between right and wrong, to make right conduct the guiding principle of his life, and thus to become an honorable, upright, and useful citizen.

Most wards of the Juvenile Court respond to training; most of them give promise of becoming good citizens. In such cases they may be honorably discharged by the Juvenile Court or by the Youth Authority, and that discharge is a bar to further prosecution. Section 836, Welf. & Inst. Code.

This case comes under Sections 747 and 749 of the Welfare and Institutions Code.

Section 747 provides that if any person who has been committed to the Youth Authority or confined in any state school appears, either at the time of his presentation or after having become an inmate thereof, to be an improper person to be retained in any institution or facility under the jurisdiction of the Youth Authority or to be so incorrigible or so incapable of reformation under the discipline of any institution or facility under the jurisdic-

tion of the Youth Authority as to render his retention detrimental to the interests of the Youth Authority, the Youth Authority may return such person to the committing court.

Section 749 provides for the remand of such incorrigibles accused of felony, for a preliminary examination, and "thereupon the usual proceedings shall be had for the trial of the case in the superior court".

[1,2] It follows therefore that constitutional provisions against double jeopardy do not apply to this case, for the reason that the proceeding in the Juvenile Court was not a criminal prosecution. Jeopardy in either its constitutional or its common-law sense has a strict application to criminal prosecutions only. 22 C.J.S., Criminal Law, § 240; see also 7 Cal.Jur., Crim.Law, Sec. 87.

Nothing in the Juvenile Court law of California having for its object the care and correction of minors is to be viewed as criminal, in the sense that that term is used in criminal law. That part of the procedure of the Juvenile Court is summary, benevolent, and designed to help human beings help themselves.

In *In re Daedler*, 194 Cal. 320, 328, 228 P. 467, it was said that the trend of modern authority has been away from the view that Juvenile Court proceedings are criminal in nature, and that a commitment by a Juvenile Court order was not designed to be, and is not a punishment for crime.

In *In re Dargo*, 81 Cal.App.2d 205, 207, 183 P.2d 282, 283, the District Court of Appeal states: " * * * the summary procedure provided by the juvenile court laws for such cases * * * is more in the character of a guardianship whereby the minor is relieved of the stigma of a criminal conviction by placing him upon probation with individuals or in institutions having the facilities to give him corrective care, supervision and training."

The judgment and the order denying a new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

121 Cal.App.2d 161

In re **VOLEN'S ESTATE.****ABRAHAMSON et al. v. SECURITY-FIRST
NAT. BANK et al.**

Civ. 19457.

District Court of Appeal, Second District,
Division 2, California.

Nov. 6, 1953.

Hearing Denied Dec. 30, 1953.

Will was contested on ground that testatrix lacked mental capacity to execute will. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment adverse to contestants, and they appealed. The District Court of Appeal, McComb, J., held that evidence sustained finding that testatrix was of sound and disposing memory and was not operating under an insane delusion at time of execution of will and codicil thereto.

Judgment affirmed.

1. Wills ⇨52(1), 55(1)

In will contest, burden was on contestants to show affirmatively and by a preponderance of the evidence that testatrix was of unsound mind or the victim of an insane delusion at time of executing will and codicil thereto.

2. Wills ⇨55(3)

Evidence sustained jury's finding in will contest that testatrix was of sound and disposing memory and was not operating under insane delusion when she executed will and codicil thereto.

3. Wills ⇨400

Where evidence was sufficient to support finding of jury in will contest, finding was binding on appeal, and District Court of Appeal was required to disregard conflicting evidence and inferences to be drawn therefrom.

4. Trial ⇨295(1)

Instructions must be considered in their entirety and not alone, separate, and apart from other instructions given.

5. Trial ⇨295(5)

In will contest, instruction on insane delusion, when considered with instructions as a whole, was not erroneous.

6. Trial ⇨253(8)

In will contest, instruction that only issues in case were whether testatrix was competent to make will and was competent to make codicil, and that undue influence or fraud was not an issue in the case, was not erroneous on ground that it precluded jury from considering evidence of undue influence or fraud on evidence of testamentary capacity.

7. Trial ⇨260(1)

Where requested instructions were merely repetitious of instructions actually given by trial court, they were properly denied.

8. Appeal and Error ⇨728(3)

Where appellants did not in a single instance point out wherein there were errors in exclusions of evidence or cite any authority to show that appellants were prejudiced by alleged error, appellants did not present alleged errors in such manner as to be properly reviewed by District Court of Appeal on appeal.

9. Appeal and Error ⇨756

Office of a "brief" attacking a decision is to point out errors complained of as shown in record, to state points on appeal separately under appropriate headings, to give arguments and authorities in support of points made, and to show that error resulted in prejudice to substantive rights of appellants.

See publication **Words and Phrases**, for other judicial constructions and definitions of "Brief".

10. Appeal and Error ⇨891

Where trial of will contest was had before jury, District Court of Appeal on appeal would deny application for permission to introduce additional evidence in District Court of Appeal relative to testimony of witness, who was absent from the state, and whose deposition was not taken.

11. Appeal and Error ⇨891

Where trial by jury is a matter of right, and has not been waived, an appellate court is without authority to receive additional evidence for purpose of reversing judgment.

Oliver O. Clark, Los Angeles, for appellants.

Calkins, Hall, Conard & Johnson, San Francisco, for University of California at Los Angeles Alumni Ass'n and Regents of University of California.

J. J. Lieberman, Los Angeles, for District Grand Lodge No. 4 of B'nai B'rith.

Warner I. Praul, Los Angeles, Cal., for Cancer Prevention Soc.

Rex W. Kramer, Sheppard, Mullin, Richter & Balthis, Frank S. Balthis and E. Talbot Callister, Los Angeles, for Security-First Nat. Bank of Los Angeles.

McCOMB, Justice.

From a judgment entered after trial before a jury, finding that Zara May Vollen was of sound and disposing mind and memory and competent to execute a will when she executed her last will and testament on May 20, 1947, and a codicil thereto on July 6, 1950, petitioners appeal.

Respondent Security-First National Bank of Los Angeles is the executor of the will, and respondents The Regents of the University of California and the University of California at Los Angeles Alumni Association, District Grand Lodge No. 4 B'nai B'rith, and Cancer Prevention Society, are beneficiaries thereunder.

Appellants (petitioners) are the brothers and sisters of decedent who were practically disinherited by the will.

Facts: On May 20, 1947, decedent, then about 62 years of age, executed her last will and testament. Thereafter on July 6, 1950, she executed a codicil thereto.

Appellants contested the probate of the will and codicil on the sole ground that the testatrix lacked testamentary capacity to make the will. The trial jury found against this contention.

Questions: First: *Was there substantial evidence to sustain the jury's finding that the testatrix was of sound and disposing memory and not operating under an insane delusion at the time she executed her will and the codicil thereto?*

[1] *Yes.* The burden is on petitioners to show affirmatively and by a preponder-

ance of the evidence that the testatrix was of unsound mind or the victim of an insane delusion at the time of executing her will and the codicil thereto. (Estate of Perkins, 195 Cal. 699, 703[2], 235 P. 45.)

In the instant case various witnesses testified of the testatrix' ability to manage her property and transact business affairs, and that she was of sound mind and disposing memory. Also the testimony indicated she knew the extent of her property and the nature and effect of her testamentary acts.

[2, 3] This evidence was sufficient and supports the finding of the jury. Therefore it is binding upon appeal (Wallace v. Sinclair, 114 Cal.App.2d 220, 227[3], 250 P.2d 154), and we must disregard conflicting evidence and the inferences to be drawn therefrom.

Second: *Did the trial court err in instructing the jury as follows?*

(A) "If Mrs. Vollen had a delusion—if she believed it upon the evidence of her senses, or upon the statements of someone in whom she had confidence, no matter how ill-founded her conviction may have been it could not be placed in the category of an insane delusion."

"However, if you find that Mrs. Vollen at the time she signed her will had sufficient mental capacity to be able to understand that she was signing a will, and to understand and recollect the nature and situation of her property, and generally the extent thereof, and to understand her relations to the persons who were the natural objects of her bounty, and you find that the will was not the product of an insane delusion, as said term has been defined to you, you must find that she was of sound mind and had testamentary capacity at the time and that the will is valid. And if you find the same facts with respect to the time of the signing of the codicil you must find that the codicil is also valid."

Appellants contend that under this instruction there was removed from the jurors' minds any consideration of Mrs. Vollen's delusion that her husband, although dead, was yet with her—sometimes manifested by her parrot or a statue—and directed what she should do.

[4] This contention is devoid of merit for the reason that instructions of the trial court must be considered in their entirety and not alone, separate and apart from other instructions given. (Los Angeles County Flood Control Dist. v. Abbot, 24 Cal.App.2d 728, 739 et seq., 76 P.2d 188.)

In the instant case in addition to the foregoing instruction the jury was instructed as follows:

"Every mental departure from the normal will not destroy a testamentary disposition. Mental derangement sufficient to invalidate a will must be insanity in one of two forms:

"(1) Insanity of such broad character as to create a general mental incompetency; or

"(2) Insanity of a more limited and narrower nature known as an insane delusion.

"An insane delusion is a false belief which is the spontaneous product of a diseased mind, which comes into existence without reason or evidence to support it, and which is adhered to against reason and against the evidence.

"An insane delusion may be found only if the belief has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning or is the spontaneous offspring of a perverted imagination, and is adhered to against all evidence and argument. If there is any evidence, however slight or inconclusive, which might have a tendency to create a belief, such a belief is not an insane delusion.

"It is not sufficient to merely establish that the testatrix was the victim of some insane delusion to avoid the Will or Codicil. The evidence must go further and establish that the Will or Codicil itself was the creature or product of such insane delusion, or, in other words, that the insane delusion bore directly upon and influenced the creation and terms of the Will or Codicil.

"If you find that Mrs. Volen was subject to an insane delusion, you must determine independently and separately, first, whether the Will of May 20, 1947, was the product of an insane delusion, and secondly,

whether the Codicil of July 6, 1950, was the product of an insane delusion."

"The possession of an insane delusion which leads a testatrix to dispose of her property otherwise than she would have done had she not possessed such insane delusion is sufficient to invalidate a will. But to have such effect the testatrix must have been actually possessed of a delusion, and it must have been an insane one. It must be such an aberration as indicates an unsound and deranged condition of the mental faculties, as distinguished from a mere belief in the existence or nonexistence of certain supposed facts or phenomena based upon some sort of evidence. If there is any evidence, however slight or inconclusive, which might have a tendency to create a belief, such belief is not a delusion. An insane delusion does not exist unless it is one whose fallacy can be demonstrated; for except such demonstration can be made, it cannot be said that no rational person would entertain the belief."

[5] Likewise the jury was instructed that it must consider the instructions as a whole. Considered thus, the instruction on insane delusion was correct. (Estate of Putnam, 1 Cal.2d 162, 172, 34 P.2d 148; Estate of Alegria, 87 Cal.App.2d 645, 654 et seq., 197 P.2d 571.)

Under the foregoing instructions it is evident the jury was not prevented from considering whether decedent was suffering under an insane delusion that she was in communication with her husband. The only alleged delusion in this case was the belief of testatrix of communion with her predeceased husband. Such delusion could not be based upon "the evidence of her senses" and therefore the instruction did not prevent the jury from considering this belief as an insane delusion. It was correct.

[6] (B) "As stated to you before, the only issues in this case are: (1) Was Mrs. Volen competent to make her will dated May 20, 1947, on that date, and (2) was Mrs. Volen competent to make her codicil dated July 6, 1950, on that date. If you understood anything in the testimony which you have heard to indicate that Mrs. Volen

was unduly or otherwise influenced by any person or persons to make said will or to leave her property as she did, or to make said codicil, you will disregard what you understood in that respect. Undue influence or fraud is not an issue in this case."

This instruction was also correct. The jury was properly instructed that the testamentary capacity of the testatrix was the issue which was to be determined. It was further told that undue influence or fraud was not asserted by appellants, and in that respect any evidence of such was to be disregarded. As used by the court in the instruction, the meaning of "in that respect" is clear. It plainly refers to any issue of fraud or undue influence which the jury might suppose to exist. This is further evidenced by the concluding sentence of the instruction advising the jury that any undue influence or fraud was not an issue. This instruction in no way precluded the jury from considering such evidence on the issue of testamentary capacity, since the court had previously instructed the jury that in determining testamentary capacity, it was to consider "all of the evidence which has been submitted to you upon the trial of the case."

Third: *Did the court commit prejudicial error in refusing to give certain instructions proposed by appellants?*

[7] No. The offered instructions were merely repetitious of instructions actually given by the trial court. Therefore they were properly denied. (*Chutuk v. Southern Counties Gas Co.*, 21 Cal.2d 372, 381, 132 P.2d 193; *Nelson v. Colbeck*, 94 Cal. App.2d 792, 797[5], 211 P.2d 878; *Luis v. Cavin*, 88 Cal.App.2d 107, 115[7], 198 P.2d 563.)

Fourth: *Did the trial court commit prejudicial error in excluding evidence proffered by appellants?*

[8] No. Appellants assert as error 29 separate instances of exclusions of evidence. They do not, however, in a single instance point out wherein there was error or cite any authority to show they were prejudiced thereby. Appellants have not, therefore, presented their alleged errors in the exclusions of evidence in such a manner as to be properly reviewed by this court.

[9] It is the office of a brief attacking a decision to point out the errors complained of as shown in the record, to state the points on appeal separately under appropriate headings, to give arguments and authorities in support of the points made, and to show that error resulted in prejudice to the substantive rights of appellants. (*People v. Daniels*, 85 Cal.App.2d 182, 185 [2], 192 P.2d 788; *Riedman v. Barkwill*, 139 Cal.App. 564, 571[7], 34 P.2d 744.)

Fifth: *Should appellants' application for permission to introduce additional evidence in the appellate court, relative to testimony of a witness who was absent from the state, and whose deposition was not taken, be granted?*

[10] No. Appellants seek permission to introduce the evidence of Rabbi Maurice Abrahamson, who was absent from the state at the time of the trial, but whose deposition was not taken.

[11] Where trial by jury is a matter of right, such as in the instant case, and has not been waived, an appellate court is without authority to receive additional evidence for the purpose of reversing the judgment. (*Steelduct Co. v. Henger-Seltzer Co.*, 26 Cal.2d 634, 648[13], 160 P.2d 804; *Syfert v. Solomon*, 95 Cal.App. 228, 231[1], 272 P. 810.)

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.

121 Cal.App.2d 33

**STATE COMPENSATION INS. FUND et al.
v. MALONEY.**
Civ. 19471.

District Court of Appeal, Second District,
Division 3, California.
Nov. 3, 1953.

Action by compensation carriers against the insurance commissioner to enjoin the commissioner from enforcing order setting new minimum compensation premium rates by allowing certain premium discounts. The Superior Court of Los Angeles County, Frank G. Swain, J., granted preliminary injunction, and the commissioner appealed. The District Court of Appeal, Vallée, J., held that granting of such injunction did not constitute an abuse of trial court's discretion.

Affirmed.

1. Injunction ⇨75

Where, in action by compensation carriers to enjoin insurance commissioner from enforcing order setting new minimum compensation premium rates by allowing certain premium discounts, commission did not request court to enjoin enforcement of second order which increased level of minimum rate for purpose of providing additional premiums to offset the discounts, court did not have jurisdiction to enjoin second order, and commission could not complain of court's failure to do so. Insurance Code, §§ 11658, 11659, 11730 et seq., 11733, 11734, 11738, 11750 et seq.

2. Appeal and Error ⇨169

Appellant cannot successfully complain because trial court fails to do something which court was not asked to do and which was not before the court.

3. Appeal and Error ⇨172(3)

Judgment will not be reversed because of failure of trial court to give relief not embraced in pleadings and not asked for.

4. Workmen's Compensation ⇨1075

Where statute authorizing insurance commissioner to change compensation insurance premium rates after holding hear-

ing to determine effect of such change, does not prescribe length of notice to be given, only reasonable notice will be required. Insurance Code, § 11734.

5. Injunction ⇨158

The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy but merely determines that, pending a trial on the merits, defendant should or should not be restrained from exercising rights claimed by him.

6. Appeal and Error ⇨954(1, 2)

Injunction ⇨135

Granting or denial of preliminary injunction is not a matter of right but rests in sound discretion of trial court, and such discretion will not be disturbed upon appeal in absence of showing of abuse thereof.

7. Injunction ⇨147

In action by compensation carriers to enjoin insurance commissioner from enforcing order authorizing new minimum compensation premium rates by allowing certain premium discounts, evidence, which revealed that sufficient time was not allowed for plaintiffs, their branch offices, employees, agents and brokers, to comply with order and applicable requirements of insurance code, was not sufficient to establish that the court had abused its discretion in ordering the preliminary injunction pending a hearing on the merits. Insurance Code §§ 381(f), 383, 11658, 11659, 11730 et seq., 11732, 11734, 11738, 11750 et seq.

8. Injunction ⇨157

Injunction restraining Insurance Commissioner, his attorneys, agents, servants, and employees during pendency and until final determination of main action, or until court should otherwise order, from carrying out or enforcing order authorizing certain workmen's compensation premium discounts was neither ambiguous nor uncertain but obviously was intended to restrain commissioner from promulgating, enforcing, or administering the order. Insurance Code, §§ 11730 et seq., 11750 et seq.

Edmund G. Brown, Atty. Gen., Walter L. Bowers, Asst. Atty. Gen., Harold B. Haas, Dep. Atty. Gen., for appellant.

Edward R. Young, John F. O'Hara, Los Angeles, McFarland, Laumeister & Ferdon, Donald Gallagher, San Francisco, F. Britton McConnell, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal from an order granting a preliminary injunction enjoining the defendant John R. Maloney, Insurance Commissioner of the State of California, from enforcing the provisions of an order signed by him on June 19, 1952, identified as Ruling No. 67.

From the verified complaint and the affidavits, viewed most favorably to plaintiffs,¹ it appears that each of the seven plaintiffs is authorized to transact workmen's compensation insurance business in California and in the year 1951 they wrote an aggregate of nearly 50% of the total premiums written in the state.

Under section 11730 et seq., of the Insurance Code, defendant as insurance commissioner is empowered and required to determine and promulgate a classification of risks and minimum premium rates relating to workmen's compensation insurance. The rates approved and issued by defendant are the minimum to be charged by every insurer.

Since 1915, and prior to June 19, 1952, revisions of minimum rates have been mainly initiated and requested by the California Inspection Rating Bureau, a voluntary organization composed of all insurers authorized to write workmen's compensation insurance in California. It was organized for the purpose of collecting and tabulating rating information and statistics for the making of minimum rates. Section 11750 et seq. of the Insurance Code, enacted in 1951, authorizes and regulates workmen's compensation insurance rating organizations. On December 28, 1951, defendant licensed the bureau and designated it as his statistical agent. It has served as

such, except in relation to the proposals and order hereinafter referred to. No other rating organization has been authorized or licensed under the provisions of this law.

On July 31, 1950, representatives of seven of the approximately one hundred and seven workmen's compensation insurers in California, aggregating only 4.98% of the total premiums written in 1951, submitted to defendant a so-called "rating program." Neither this group nor any of its members are now or were at any time licensed to act as a rating organization. None of the proposals included in the program were collected, tabulated, or approved by the bureau, but on the contrary, it at all times refused to approve such proposals.

In November of 1950, defendant, then Deputy and Chief Assistant Insurance Commissioner, conducted hearings with respect to this proposed program in which plaintiffs participated. On June 18, 1952, one day before the order complained of was signed, there was filed with defendant in said proceeding an exhibit, numbered 42, by persons or organizations not authorized to make such filing. No copy of Exhibit 42 was served upon or received by any of the plaintiffs. There was no hearing in connection with Exhibit 42, although plaintiffs are informed and believe it materially affects the "rating program."

On June 19, 1952, defendant signed an order identified as Ruling No. 67. Ruling No. 67 amended section 2350 of title 10 of the Administrative Code, as specified in Appendix A attached thereto, and section 2352 of title 10 of the Administrative Code, as specified in Appendix B attached thereto. Appendix A is a mandatory premium discount plan. Appendix B contains three new, optional, alternative, retrospective rating plans designated as Plans A, B, and D.

On June 26, 1952, each plaintiff received through the mail from the office of defendant a mimeographed copy of Ruling No. 67. In the explanations under the heading "Findings and Conclusions" are found the statements that the proposed premium dis-

4. Voeltz v. Bakery Etc. Union, 40 Cal. 2d 382, 254 P.2d 553; Globe Dairy

Lunch C_o. v. Joint Culinary Wkrs., 117 Cal.App.2d 190, 255 P.2d 94.

count plan of Appendix A and the retrospective rating Plan D of Appendix B have been approved subject to modification. Under the title Appendix B there is a note: "Appendix B is not included in this copy of the Commissioner's Decision. * * * Plan D, as approved, may be inspected at the Insurance Commissioner's office in San Francisco and Los Angeles. The plan will be published in the near future by the California Inspection Rating Bureau." On June 25, 1952, the bureau prepared a mimeographed circular letter, which was mailed to all members on June 27th; but it was not received earlier than June 30th and was not received at all by many interested persons, including thousands of agents and brokers. The letter purported to include the entire data which defendant's Ruling No. 67 designated as Appendix B; However, it states: "Tabular Plans in the form of Plan A and Plan B within the framework of Plan D are now in the process of preparation * * * and will be available as soon as possible." On information and belief, plaintiffs allege that scores of agents and brokers have called upon members of defendant's staff requesting information as to the operation of the plans, only to be advised that even Insurance Department personnel cannot supply the information or explain the plans.

The premium discount plan, Appendix A, provides for the interstate combination of workmen's compensation premiums. The plan distinguishes between buyers of insurance according to the size of the annual premium and provides a discount based upon the size of the premium. The discounts would be enjoyed only by employers paying more than \$1,000 a year. An employer with operations in California and in other states would receive a discount on his California premium, no matter how small, if his combined premium in all states exceeded \$1,000. It would be available to fewer than 15,000 of the more than 300,000 California

employers carrying workmen's compensation insurance.

The retrospective plans, Appendix B, provide for combination of the insured employers' workmen's compensation experience in California with such experience in other states. Plans A and B are available to employers, on an elective basis, who produce \$1,000 or more workmen's compensation annual standard premiums from all eligible states. Plan D is available only to employers paying annual premiums in excess of \$5,000 from all eligible states and from all lines of liability insurance. In neither case is there any minimum eligibility respecting California workmen's compensation insurance premiums alone. Final determination of a premium under the plans is determined after the expiration of the insurance, on the basis of paid and estimated loss experience incurred during the insurance period. Plans A and B are "tabular plans" and the tables relating thereto are not calculated or approved and remain unavailable. Plan D embodies a program of extreme complexity and it would take many months before carriers, agents, brokers, and insurance buyers would be able to function under it.

On information and belief, plaintiffs aver: Appendix B is an extensive and voluminous document consisting of approximately sixty pages, containing complicated rules, regulations, statistics, formulae, and tables; essential portions have not yet been calculated, and have not been submitted to, nor approved nor issued by, defendant; the appendix will not be available to plaintiffs in sufficient time, or at all, in advance of July 1, 1952, in order for them, their branch offices, employees, agents, and brokers to comply with the order and the requirements of the Insurance Code, particularly sections 381, 383, 12926, and 12928.² Section 381(f) (2) applies to all workmen's compensation insurance policies issued in California, in which approximately 350,000 such policies

2. Section 381 provides: "A policy shall specify: * * * (f) Either: (1) A statement of the premium, or (2) If the insurance is of a character where the exact premium is only determinable upon the termination of the contract, a state-

ment of the basis and rates upon which the final premium is to be determined and paid." Section 383 makes it a misdemeanor to issue a policy in violation of the requirements of subdivision (f) of section 381. Section 12926 makes it

are issued each year. The order affects the basis and rates upon which the final premium is to be determined and paid under such policies.

Plaintiffs allege that the order of defendant is unlawful, invalid, arbitrary, and constitutes an abuse of discretion on his part because:

a) The plans discriminate against California workmen's compensation insurance carriers and discriminate in favor of a few large insurers operating nationwide. The combination of premiums from other liability lines compounds this discriminatory feature against California insurers writing workmen's compensation insurance exclusively.

b) The plans would be especially unfair, injurious, prejudicial, and unlawful to the State Compensation Insurance Fund, since it is authorized to write only compensation insurance and only such in California.

c) The classification of risks and premiums approved by defendant, separately from the "rating proposals," was found by him to be the minimum rates adequate for all workmen's compensation carriers in the state. The superimposition upon minimum adequate rates of advance premium discounts would result in inadequate rates.

d) The plans are not uniform as to all insurers affected. Section 11732 of the Insurance Code requires that the insurance commissioner shall approve or issue a classification of risks and premium rates. In the past this has been construed as requiring the commissioner to make classifications of the occurrence and severity of injury inherent in the various occupations in which workers are engaged. The order would completely change the meaning by construing it to classify employers (buyers of insurance) solely by the standard of the amount of premiums paid.

e) The interstate features of the plans result in the unlawful relinquishment by defendant of his power and duty to determine

what are minimum adequate rates in California.

f) The plans violate section 11738 of the Insurance Code by permitting a refund by discount of premium from surplus which is not "surplus accumulated from premiums on workmen's compensation policies issued pursuant to laws of this State", but from surplus wherever or however earned, within or outside of California.

g) The proposed plans have as their basis an anticipated graduation of insurance agents' and brokers' commissions and actual graduation of other expense. Defendant is not authorized to regulate the commissions paid by insurers, but by his order he is attempting to force these matters of private contract to be made at rates approved by him.

h) The order is vague, uncertain, incomplete, and indefinite.

i) The order and the purported findings of the defendant are not based upon any competent or substantial evidence or any evidence at all.

j) The early inception date of the plans would bring chaos to the entire compensation insurance industry. Insurance Code sections 11658 and 11659 prohibit issuance of any policy or endorsement prior to approval thereof by the insurance commissioner. The premium discount plan and the retrospective rating plans require new forms, none of which are in existence, and no time remains in which to prepare them, obtain defendant's approval, obtain printed supplies, and distribute them. A reasonable period of time prior to the inception of a renewal policy, averaging more than twenty days, is necessary in which to prepare such renewal policies and deliver them, and employers are entitled to a reasonable period of time to familiarize themselves with the plans. In previous comparable changes the insurance commissioner has allowed such a reasonable time and seldom if ever less than thirty days following promulgation and

the duty of the insurance commissioner to "require from every insurer a full compliance with all the provisions of this code." Section 12928 provides for crim-

inal prosecution of any insurer or any of its agents, officers, or employees violating any penal provision of the code.

publication. In the present instance, defendant signed the order on June 19, 1952, to be effective July 1, 1952, a period of eleven days, which included two week-ends. Tens of thousands of workmen's compensation insurance policies expire on July 1, 1952, and immediately thereafter.

Plaintiffs in their prayer sought: 1) a preliminary injunction and upon the trial of the action a permanent injunction, enjoining defendant from enforcing the provisions of the order of June 19, 1952, contained in Ruling No. 67; 2) a declaration of the rights and duties of the parties with respect to the order, including a determination of the validity of the order and the proper construction and enforceability thereof; and 3) a writ of mandamus commanding defendant to vacate, annul, and set aside the order.

The manager of the State Compensation Insurance Fund stated, by affidavit, that Ruling No. 67 "will make it impossible for the State Compensation Insurance Fund to compete with other insurers," and will be in conflict "with long and undisputed administrative conduct by the Industrial Accident Commission as governing body of the Fund."³

At the time of the hearing on the order to show cause, no answer nor demurrer had been filed by defendant. Four counter-affidavits were filed by him, which do not in any material or substantial respect deny the facts alleged in the complaint and supporting affidavits. However, defendant in his affidavit states: On June 19, 1952, he simultaneously issued two orders, identified as as Ruling No. 67 and Ruling No. 68; included in Ruling No. 68 was a temporary

"Emergency Safety Factor," which resulted in 1.6% increase in the rate level for the purpose of providing additional premiums to permit the premium discounts promulgated by Ruling No. 67 to be applied and still leave an adequate rate level; the premium discount portion of Ruling No. 67 and the rate order in Ruling No. 68 each expressly referred to one another and it was intended by him that they should be interdependent one upon the other as constituting interrelated amendments; and the enjoining of Ruling No. 67 while permitting Ruling No. 68 to go into full force and effect does not operate to preserve the status quo on June 30, 1952, pending judicial determination of the propriety and validity of Ruling No. 67. Ruling Nos. 67 and 68 were attached to defendant's affidavit as exhibits.

The proceeding which culminated in Ruling No. 67 was initiated August 4, 1950. Extensive hearings were had. The ruling was issued June 19, 1952. The proceeding which culminated in Ruling No. 68 was initiated April 4, 1952. The ruling was issued June 19, 1952. Separate notices of hearing were given; separate and distinct hearings were held; and separate orders resulted.

On July 10, 1952, the court issued a preliminary injunction. The injunction orders that "the defendant John R. Maloney, Insurance Commissioner of the State of California, your attorneys, agents, servants and employees be, and they hereby are absolutely restrained and enjoined, during the pendency of the above-entitled action, and until its final determination, or until the Court shall otherwise order, from carrying out or taking any action whatsoever to

3. The manager of the State Compensation Insurance Fund further stated: "The operation of the plans approved in Ruling 67 will, by their inherent multiline and inter-state attributes, irrevocably exclude the State Compensation Insurance Fund from competing at all for important segments of the workmen's compensation insurance business in California; will seriously limit the volume, breadth and character of operations which henceforth the Fund may insure in competition with private insurers, and particularly with out-of-state

insurers who are licensed to write workmen's compensation insurance in California; will seriously tend to promote an adverse selection of risks against the Fund by narrowing the field in which the Fund can transact business, in contrast to the wider scope of competitive action open to other insurers; and will do literally irreparable harm to the State Compensation Insurance Fund, to its insureds, and to injured workers and dependents of injured workers everywhere in the State, no matter by whom insured."

promulgate, enforce, or administer the provisions of the order signed by defendant, Insurance Commissioner, John R. Maloney, on or about June 19, 1952 contained in the document entitled 'State of California, Department of Insurance, Ruling No. 67, File No. SF 5350-16A.'"

[1] Nowhere in the complaint—nor, with two exceptions, in any affidavit filed by plaintiffs—is there any mention of Ruling No. 68. The only pleading on file was the complaint in which an injunction was sought with respect to Ruling No. 67. Neither party asked the court for any relief relative to Ruling No. 68. Despite this state of the record, the only point made by defendant is that the court exceeded its jurisdiction and abused its discretion by enjoining the discount provision of Ruling No. 67, while permitting Ruling No. 68 to remain in force. Defendant does not contend that the order is not supported by substantial evidence. He says the trial court, in enjoining the operation of Ruling No. 67 while at the same time permitting Ruling No. 68 to remain in effect, exercised a legislative function by increasing the level of minimum rates since Ruling No. 68 increased the level 1.6%. He does not deny that the court has jurisdiction to enjoin the enforcement of rates when they are unreasonable, confiscatory, discriminatory, or arbitrarily established. The only issue before the court was whether defendant should be enjoined from promulgating, enforcing, or administering Ruling No. 67. No issue or controversy was tendered relative to Ruling No. 68. Since defendant did not take any appropriate means to request the court to act or frame its injunction with respect to Ruling No. 68, the court had no jurisdiction to take any affirmative action with reference to that ruling.

[2,3] It is fundamental that a party on appeal cannot successfully complain because the trial court failed to do something which it was not asked to do and which was not before the court. *Miller v. Bay Cities Water Co.*, 157 Cal. 256, 285, 107 P. 115, 27 L.R.A.,N.S., 772; 3 Cal.Jur.2d 604, § 140. A judgment will not be reversed because of the failure of the trial court to

give relief not embraced in the pleadings and which it was not asked to give. *Buck v. Canty*, 162 Cal. 226, 238, 121 P. 924. Defendant is precluded from complaining that the trial court failed to act with respect to Ruling No. 68.

The court by the preliminary injunction did not fix rates. It left defendant free to perform the functions imposed on him by law with respect to Ruling No. 68. He could after a hearing, on reasonable notice, suspend its operation, amend it, cancel it, or supplement it in any lawful manner so long as he did not seek to enforce Ruling No. 67. The effect of defendant's contention is that he concedes he acted unlawfully in issuing Ruling No. 67, but that the trial court, on its own motion, should have also enjoined the operation of Ruling No. 68 although there was no evidence before the court that he had acted unlawfully in issuing that ruling.

[4] Defendant says that at the hearing below "the court remarked that if the effect of its injunction upon administration of Ruling No. 67, while leaving No. 68 in effect, would be higher rates, the Commissioner could suspend Ruling No. 68." We agree. Insurance Code, section 11734 reads: "The commissioner may change any such classification or system previously approved or issued if he first holds a hearing to determine the effect of the proposed change upon the adequacy or inadequacy of rates. Such changes shall also be uniform as to all insurers affected." Defendant concedes he was free to act under section 11734, but says that this "would have required a considerable lapse of time." We are unable to perceive any force in this statement. A hearing could have been had in a short time. The statute does not prescribe the time that notice of a hearing should be given—hence, only reasonable notice is required. *Burden v. Stein*, 25 Ala. 455; *People v. Frost*, 32 Ill.App. 242; 66 C.J.S., Notice, § 18, b, p. 659. See *Carroll v. California Horse Racing Bd.*, 16 Cal.2d 164, 167, 105 P.2d 110. If, as defendant contends, the effect of enjoining the operation of Ruling No. 67 while leaving No. 68 in force, was to increase the

minimum rate level and such increase would not have resulted if operation of No. 67 had not been enjoined, then little data, all of which was available, would have been necessary. See *Hutchinson v. Hutchinson Gas Co.*, 125 Kan. 346, 264 P. 68, 72, 57 A.L.R. 137. In suspending the operation of Ruling No. 68 defendant would be merely adjusting the rate level to meet new conditions—the enjoining of Ruling No. 67.

Furthermore, if, after operation of Ruling No. 67 had been enjoined, defendant felt that No. 68 also should have been enjoined there was no reason why he could not have applied to the trial court for modification of the preliminary injunction in that respect. The preliminary injunction specifically says that it is effective until final determination of the action “or until the Court shall otherwise order.” Under these circumstances the trial court has power to modify a preliminary injunction. *Wheeler v. Superior Court*, 82 Cal.App. 202, 208, 255 P. 275. See *United Railroads v. Superior Court*, 170 Cal. 755, 151 P. 129.

[5,6] The only issue is whether the trial court abused its discretion in granting the preliminary injunction. In the absence of a general demurrer in return to an order to show cause for a preliminary injunction, the question for decision on the hearing is whether the defendant should or should not be restrained *pendente lite* from exercising rights claimed by him. *Trickey v. City of Long Beach*, 101 Cal.App.2d 871, 878, 226 P.2d 694. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that pending a trial on the merits the defendant should or should not be restrained from exercising the rights claimed by him. *Fresno Canal & Irrigation Co. v. People's Ditch Co.*, 174 Cal. 441, 447, 163 P. 497; *Miller & Lux v. Madera Canal etc. Co.*, 155 Cal. 59, 62-63, 99 P. 502, 22 L.R.A., N.S., 391. The universal rule is that the granting or denial of a preliminary injunction is not a matter of right but rests in the sound discretion of the trial court. *Brock v. Superior Court*, 11 Cal.2d 682, 688, 81 P.2d 931; *Lutz v. Western Iron &*

Metal Co., 190 Cal. 554, 560, 213 P. 962; *London v. Marco*, 103 Cal.App.2d 450, 452, 229 P.2d 401; 14 Cal.Jur. 180, § 7. Such discretion will not be disturbed on appeal in the absence of a showing of abuse. *Piper v. Hawley*, 179 Cal. 10, 19, 175 P. 417; *Fresno Canal & Irrigation Co. v. People's Ditch Co.*, 174 Cal. 441, 447, 163 P. 497; *London v. Marco*, 103 Cal.App.2d 450, 452, 229 P.2d 401; *People ex rel. Dept. Ind. Rel. v. Morehouse*, 74 Cal.App.2d 870, 876, 169 P.2d 983; 14 Cal.Jur. 182, § 7.

[7] On the facts stated in the complaint and in the affidavits, it cannot be said that the court abused its discretionary power in ordering a preliminary injunction pending a hearing on the merits. The court was warranted in concluding, on the showing made, that plaintiffs, and particularly the State Compensation Insurance Fund, would suffer great and irreparable injury should operation of Ruling No. 67 not be enjoined *pendente lite*. The trial court may well have also concluded that an emergency existed in that Ruling No. 67 was incomplete in material respects, was mandatory in its terms, and that plaintiff insurers, insurance agents and brokers, and employers would be in immediate peril of violation of the Insurance Code if operation of the order was not enjoined. The order was signed on June 19, 1952, to be effective July 1, 1952, a period of eleven days, which included two week-ends, although the proceeding had been pending nearly two years.

[8] The preliminary injunction is neither ambiguous nor uncertain. Judgments are to have a reasonable intendment. The legal effect governs, rather than the mere language used. A careful reading of the wording of the injunction does not reveal any ambiguity in the language of the court. The obvious meaning, intent, and effect of the language is to restrain defendant from promulgating, enforcing, or administering the provisions of Ruling No. 67. The preliminary injunction suspends the operation of Ruling No. 67, preserving the status quo as it existed prior to the time it was made, until the final determination of the action or until the trial court shall otherwise order.

The appeal is from the order granting the application of plaintiff for a preliminary injunction and from the preliminary injunction.

The order and the preliminary injunction are affirmed.

PARKER WOOD, J., concurs.

SHINN, P. J., did not participate.



120 Cal.App.2d 901

PEOPLE v. BROADY.

Cr. 5031.

District Court of Appeal, Second District,
Division 2, California.

Oct. 30, 1953.

Hearing Denied Nov. 25, 1953.

Prosecution for violation of section 288 of Penal Code relating to crimes against children. Initially defendant pleaded not guilty but at a later date withdrew his plea of not guilty and entered plea of guilty. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment. Defendant appealed therefrom and from the sentence and from order denying his motion for new trial and from order denying his motion to vacate his guilty plea. The District Court of Appeal, Fox, J., held that under the circumstance the court did not abuse its discretion in refusing to allow defendant to change his plea to not guilty.

Judgment and order denying new trial affirmed; appeals from sentence and from order denying vacation of guilty plea dismissed.

1. Criminal Law ⇨1023(10)

There is no appeal from a sentence.

2. Criminal Law ⇨1023(3), 1134(10)

There is no appeal from an order denying a motion made before judgment to set aside plea of guilty, but such an order may be reviewed upon appeal from the judgment. Pen.Code, § 1237.

3. Criminal Law ⇨274

The fact that defendant accused of crime against child was adjudged a sexual psychopath did not mean that he was insane or incapable of understanding the nature of the proceedings or consequences of his change of plea from not guilty to guilty and did not constitute such good cause as would require trial court to permit defendant to withdraw the guilty plea and plead not guilty. Pen.Code, § 288; Welfare and Institutions Code, § 5500, 5505, 5512.

4. Criminal Law ⇨274, 1149

A defendant who desires to have his plea of guilty set aside must show good cause therefor, and the granting or denial of such application is a matter resting in sound discretion of trial judge whose decision will not be disturbed on appeal in absence of an abuse thereof.

5. Criminal Law ⇨1035(1)

Where defendant did not demand a jury trial on question of his sexual psychopathy until six days after he appealed from judgment of conviction for violation of statute relating to crimes against children, the matter of the jury trial could not be considered on such appeal. Pen.Code, § 288; Welfare and Institutions Code, § 5512.5.



William J. F. Brown and Lowell Lyons, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loeb, Deputy Atty. Gen., Ojai, for respondent.

FOX, Justice.

Defendant was charged in three counts with violating section 288 of the Penal Code. Initially, he entered a plea of not guilty. Thereafter, on September 18, 1952, by leave of court and with his counsel present, defendant withdrew his plea of not guilty as to count I and entered a plea of guilty. On October 10, 1952, after considering the doctors' reports filed pursuant to section 5505 of the Welfare and Institutions Code, the court found defendant to be a sexual psychopath as defined in section

5500 of the Welfare and Institutions Code, and ordered him committed to the Norwalk State Hospital for a period of ninety days for observation and diagnosis under section 5512 of the Welfare and Institutions Code. Defendant having been returned to court following this 90-day observation period was again found to be a sexual psychopath, and it was also found he would not benefit from further treatment in a state hospital. Having changed counsel on March 9, 1953, defendant moved to vacate his previous plea of guilty to count I and also made a motion for a new trial. These motions were denied as was his application for probation and he was sentenced to the state prison. Defendant, on March 12, appealed from the judgment and sentence and from the order denying his motion for a new trial, and also from the order denying his motion to vacate his plea of guilty.

[1,2] There is no appeal from a sentence. *People v. Ray*, 13 Cal.App.2d 701, 703, 57 P.2d 975. There is likewise no appeal from an order denying a motion made before judgment to set aside a plea of guilty, Penal Code, sec. 1237, but such an order may be reviewed on the appeal from the judgment. *People v. Morgan*, 9 Cal.App.2d 612, 617, 50 P.2d 1061. These purported appeals must, therefore, be dismissed.

[3] Defendant seeks a reversal of the judgment on the theory that he did not fully comprehend the effect of changing his plea from not guilty to guilty, and in support thereof relies on the fact that the court found him to be a sexual psychopath. Although defendant was adjudged a sexual psychopath this does not mean he was insane or incapable of understanding the nature of the proceedings or the consequences of his change of plea. In *re Keddy*, 105 Cal.App.2d 215, 218, 233 P.2d 159; *People v. Tipton*, 90 Cal.App.2d 103, 104, 202 P.2d 330. No other facts were presented by defendant in support of this contention. Defendant was, however, represented by counsel when the request was

made to change his plea. He personally stated this was his desire and that no one had made any promise to him of any kind. The defendant was before the court a number of times during these proceedings and the court had an opportunity to see him and to observe how he reacted to the proceedings and the questions that were asked him. The court also had the benefit of several psychiatric reports on the defendant. In this connection it is to be noted that a period of almost six months elapsed between defendant's change of plea and his request to have it vacated.

[4] A defendant who desires to have his plea of guilty set aside must show good cause therefor. The granting or denial of such an application is a matter resting in the sound discretion of the trial judge whose decision will not be disturbed on appeal in the absence of an abuse thereof. *People v. Tidwell*, 108 Cal.App.2d 60, 63, 238 P.2d 21; *People v. Price*, 51 Cal.App.2d 716, 718, 125 P.2d 529; *People v. Griffin*, 100 Cal.App.2d 546, 224 P.2d 47. There is no abuse of discretion here shown.

[5] Defendant complains that he did not have a jury trial on the question of his sexual psychopathy, pursuant to section 5512.5, Welfare and Institutions Code. The answer to this contention is simple. No suggestion or request for a jury trial on that issue was made until March 18, 1953, on which date it was also denied. There is nothing in the record to show that the defendant appealed from the order denying this demand. It certainly cannot be raised on the appeal from the judgment, because that appeal was taken on March 12, 1953,—six days before this demand or order was ever made.

The purported appeals from the sentence and from the order denying motion to set aside the plea of guilty are dismissed. The judgment and the order denying the motion for a new trial are affirmed.

MOORE, P. J., and McCOMB, J., concur.

41 Cal.2d 668

SOKOLOW et al. v. CITY OF HOPE.**L. A. 22812.**

Supreme Court of California.

In Bank.

Nov. 10, 1953.

Action against charitable corporation for injuries sustained by volunteer waitress who fell while serving food for benefit of the corporation. The Superior Court, Los Angeles County, R. Morgan Galbreth, Judge pro tem., granted defendant's motion for directed verdict, and plaintiffs appealed. The Supreme Court, Schauer, J., held that question whether corporation's alleged negligence in installing gas pipe running along floor was proximate cause of waitress's injuries was for jury and that evidence was sufficient to establish that committee, which was conducting a town fair at which waitress was injured, was corporation's agent.

Judgment reversed but purported appeals from verdict and order denying plaintiffs' motion for new trial dismissed.

Prior opinion, 255 P.2d 451.

1. Appeal and Error ⇨110

Verdict and order denying plaintiffs' motion for new trial were nonappealable orders.

2. Appeal and Error ⇨854(5)

Where defendant's motion for directed verdict presented to the trial court grounds of both insufficiency of evidence to show negligence constituting a proximate cause of the accident and to establish any agency connection between committee for which one plaintiff worked and defendant, judgment predicated upon such directed verdict would be affirmed if the trial court's action was proper under either of such grounds.

3. Trial ⇨142

A court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient

substantially to support any verdict in favor of plaintiff.

4. Charities ⇨45(2)

In action against charitable corporation for injuries sustained by volunteer waitress who fell while serving food for benefit of corporation, question whether corporation's alleged negligence in installing gas pipe running along floor was proximate cause of waitress' injuries was for jury.

5. Principal and Agent ⇨21

The fact of agency, where it rests in parol, may be established at trial by testimony of agents.

6. Charities ⇨45(2)

In action against charitable corporation for injuries sustained by volunteer waitress when she fell while serving food for benefit of corporation, evidence was sufficient to establish that committee, which was conducting a town fair at which waitress was injured, was corporation's agent.

Trope & Trope, Eugene L. Trope and Sorrell Trope, Beverly Hills, for appellants.

Moss, Lyon & Dunn, Richard B. Coyle and Henry F. Walker, Los Angeles, for respondent.

SCHAUER, Justice.

[1] Plaintiffs, husband and wife, appeal from an adverse judgment entered upon a directed verdict in their action to recover damages resulting from personal injuries suffered by plaintiff wife¹ when she tripped and fell to the floor. We have concluded that the evidence is sufficient to support a verdict in plaintiffs' favor, and that the judgment should be reversed. Purported appeals from the verdict and from an order denying plaintiffs' motion for a new trial, being from nonappealable orders, must be dismissed. (Sawyer v. Sunset Mutual Life Ins. Co. (1937), 8 Cal.2d 492, 501, 66 P.2d 641.)

The only defendant is City of Hope, a California corporation and charitable organization. On March 4, 5 and 6, 1950, the

1. Unless otherwise stated, the designation "plaintiff" will hereinafter refer to the injured wife.

"Central Jewish Committee" (hereinafter sometimes termed the committee), which the record indicates was formed as an "auxiliary" of defendant, held an annual "Town Fair" at the Shrine Auditorium in Los Angeles, which the committee had rented for the occasion. The net proceeds of the fair were to be given to defendant. Plaintiff's fall occurred while she was acting as a volunteer waitress at the fair, serving foods and coffee.

Defendant's motion for a directed verdict was made upon the grounds, among others, that "there is no showing or evidence of any negligence on the part of this defendant which was the proximate cause of the accident in question," and that "there is no evidence that the defendant or its agents, if any, exercised any control over the Town Fair [of 1950] or had a right to exercise any such control, * * * [or] that the Central Jewish Committee was, at the time of the accident in question, acting as the agent of the defendant City of Hope." The trial court stated, as the ground for granting defendant's motion, that "The Court feels that the agency has not been satisfactorily shown to hold the City of Hope as a corporation liable for the accident that the evidence shows took place."

[2] Inasmuch as the motion for a directed verdict presented to the trial court the grounds both of insufficiency of evidence to show negligence constituting a proximate cause of the accident and of like insufficiency of the evidence to establish any agency connection of the committee with the defendant, the judgment predicated upon such verdict will be affirmed if the court's action was proper upon either of such grounds. (See *United Air Services, Ltd. v. Sampson* (1938), 30 Cal.App.2d 135, 138, 86 P.2d 366.)

[3] As stated in *Burlingham v. Gray* (1943), 22 Cal.2d 87, 94, 137 P.2d 9, "A court may direct a verdict only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the

plaintiff. [Citations.]" (See also *Raber v. Tumin* (1951), 36 Cal.2d 654, 656, 226 P.2d 574 [nonsuit]; *Martin v. Food Machinery Corp.* (1950), 100 Cal.App.2d 244, 252, 223 P.2d 293 [rule same on nonsuit and on directed verdict motions].)

Thus viewing the evidence in the light most favorable to plaintiff, it appears that in performing work as an unpaid volunteer waitress plaintiff customarily stood behind a table (sometimes termed a "booth") some thirty feet long by four feet wide and passed food and coffee across the table to her customers. Other similar tables were set up in the same room. To provide fuel for cooking, an exposed gas pipe line had been installed, running along the surface of the floor and underneath the tables. Areas some three to four feet wide existed between the ends of plaintiff's table and the ends of the tables nearest thereto; in such areas no covering or other device was installed to prevent tripping over the gas pipe running along the floor. A vice-president of the committee testified that "I am the chairman for installing Town Fair * * * for the City of Hope," including "the booths or tables and "the gas pipe installations for heat * * * And for serving coffee and the like"; that for fourteen years he had supervised installations of the gas pipes, which had always been "laid the same way," although in previous years exposed areas of the pipe had been covered with boards or a "ramp" to prevent tripping; for the 1950 Town Fair (during which plaintiff was injured) he had not, because he was called away by the death of his wife, given orders to his "working group * * * regarding any installations of the pipe or covering the pipe."

Plaintiff's accident occurred on Sunday, March 5. She testified, "Well, it was between 2:00 and 3:00 o'clock in the afternoon and the crowd was very big and everyone wanted to eat at the same time. They all come and clamored for food and they wanted it so I served—I had a party of about ten and I served them sandwiches of different kinds; and then they went to sit down at the table further down than the table where we worked. And while standing there and working, one man hollered

out, 'Hand me a cup of coffee, please.' And I took the cup and the urn was right near me with the coffee already done. I took that cup of coffee and I was going out [around the corner of the table] to hand it to the man because they were at the table; and as I reached the corner of the stand wherever the table was, I felt I was falling. I tripped on something. I felt I was falling and I tried to prevent myself, but I couldn't. That is all I know * * * Until after they woke me up. I fell. I don't know what happened * * * I didn't know what I fell over * * * Plaintiff also testified that "I can't say whether" the floor was made of concrete or wood. Mrs. Greenberg testified that she was working beside plaintiff, behind the same table; that "I was standing there making those hamburgers, and Mrs. Sokolow was standing and she was drawing the coffee. And as she turned, I seen her fall"; that plaintiff as she was going out to serve the coffee fell in the area between the end of her booth or table and that of the next table; that the witness had had "occasion to go through the same area that day * * * and I almost fell myself * * * I almost tripped."

[4] The record discloses no other witnesses to the fall and no other evidence as to its cause. Defendant urges that plaintiff has thus failed to produce any evidence from which a jury could determine what or whose negligence was responsible for the fall, that "Under the evidence, she could as easily have tripped and fallen by reason of twisting her foot in turning or caught her foot against the table leg or tripped upon her dress or apron or other apparel, etc.," and that any verdict in favor of plaintiff would necessarily have been founded upon guess, conjecture and speculation as to the proximate cause of her fall. It appears, however, that plaintiff's evidence as to proximate cause is closely analogous to that which the majority of this court held, in *Blumberg v. M. & T. Incorporated* (1949), 34 Cal.2d 226, 229, 209 P.2d 1, would support an inference that plaintiff's "left heel became wedged in the [floor] mat * * *, causing her to fall." In that case,

in which plaintiff fell on a large mat in front of the elevators of an office building, while walking with head erect, watching her way, plaintiff testified in part, "* * * I remember taking a few steps and then all of a sudden * * * there was a feeling as though something held me down and right with that simultaneously my head was hitting this terrazzo floor and someone called out. It was all in one, this blow here; I just remember going down and cracking my head"; plaintiff had no "sensation as if" her foot had slipped or of her ankle having turned. The only other witness to the accident simply saw plaintiff fall "* * * absolutely straight as though she had had something hold her or pull her * * * She fell in one straight piece * * * her knees didn't go down first, her arms didn't go down first * * *" (page 227 of 34 Cal.2d, page 2 of 209 P.2d.) In the case now before us, although no witness stated that plaintiff tripped over the gas pipe, we are of the view that an inference that it was such gas pipe that she tripped over is permissible. As set out above, plaintiff, herself, testified that she tripped over something; it was shown that the exposed gas pipe ran along the floor under the tables and between the ends of the tables; and it was further shown that it was between the ends of two of the tables that plaintiff tripped and fell. Defendant makes no contention that the exposed condition of the pipe did not constitute negligence. It follows that plaintiff's evidence was sufficient to support a verdict so far as concerns the question of proximate cause.

The issue remains as to whether the evidence would support a finding that the Central Jewish Committee in its activities in connection with the Town Fair was acting as the agent of defendant City of Hope. The evidence bearing on this issue is substantially as follows:

The committee vice-president who was "chairman for installing Town Fair, and picnics for the City of Hope," testified that "we install stalls for all kind[s] of merchandise, to sell it under the name of the Central Jewish Committee for the City of Hope; and to sell it we get all the stuff

free. We sell it and give the money to the City of Hope." In answer to the question, "In what way is the Central Jewish Committee, of which you are an officer, related or connected to the City of Hope, the corporation?", the witness stated that "We are auxiliary over thirty year[s] to the City of Hope * * * [and act] at their direction. We only work for the City of Hope * * * The City of Hope is a situation like this: They have about 25 auxiliaries all over the United States and the only function they have, the auxiliaries, is to get money for sick people for the City of Hope * * * [T]he function of the Central Jewish Committee is a fund-raising group for the City of Hope * * * [W]e were in conjunction with the City of Hope and the office which the City of Hope use on all occasions to raise the money." The City of Hope gave "a charter to the Central Jewish Committee to operate for it * * * To act on its behalf * * * I understand the relationship like this: That we work as an independent organization for the City of Hope, under the City of Hope Charter." The charter was available but was not offered in evidence. The committee leased the Shrine Auditorium in which the fair was held, and after deducting expenses the "proceeds from the Town Fair are then turned over to the City of Hope." Outside the hall at the 1950 fair the committee put up a sign reading, "Town Fair running by the Central Jewish Committee for the City of Hope." The City of Hope also had "different branches" or "auxiliaries" engaged in "fund-raising activity" in Los

Angeles, some but not all of which were "under the Central [Jewish] Committee"; at the 1950 fair some 26 to 30 separate groups "were gathered there under the auspices of the Central Jewish Committee for the Town Fair"; plaintiffs were members of one of such groups, called the "Cleveland Friendly Society," which it was testified "is an organization to do charity, to help, to work and make money and give it to charitable institutions."

Plaintiff had participated in the "Town Fairs" in previous years, in response to written invitations. The week preceding the trial herein plaintiff received an invitation to the 1952 fair; it was on a letterhead commencing "City of Hope A Free National Medical Center Under Jewish Auspices"; beneath these words appeared "Central Jewish Committee." The invitation was signed by "I. Levitt, President" of the committee,² and was "something like" the "type of invitation" plaintiff had received in years prior to her accident; "they make an urgent plea. During the year we get several letters, come to meetings, and so forth." In addition, prior to the 1950 fair, "an officer of the City of Hope came to our [i. e., Cleveland Friendly Society] meeting before the Town Fair and asked if we will participate in having a booth, as we had every year for 10 years past, and we consented to work." Plaintiff was not an officer of the committee and had no knowledge concerning "arrangements" or "contracts, anything of that sort between the City of Hope and the Central Jewish Committee," but testified that "I know we worked for the City of

2. The invitation reads as follows:

"Dear Friends:

"The Town Fair needs your support more than ever, and each meeting from now on becomes even more important than the one before.

"The victims of cancer and tuberculosis are depending on us and we must not fail them. The money that we raise at the Town Fair will supply the needed food, medical attention, and care that will enable them to return to their loved ones.

"A regular meeting of the Central Jewish Committee will be held:

"Thursday Evening—

"January 24th—8 P.M.

"Vladeck Center—

"126 N. St. Louis St.

"The sponsors of this meeting will be the Warsaw Young Men's Society and Ladies Social Club. They cordially invite everyone to attend and enjoy an evening of entertainment and refreshments.

"Hoping to see you at the meeting Thursday evening, I am

"Sincerely yours,

"s/ I. Levitt

"I. Levitt,

"President"

Hope. I didn't know anybody else." Plaintiff husband testified that "I understand that these [written] invitations are the usual invitations that would be for the workers of the different charities to be invited through," rather than an invitation to attend the fair and spend money there. The evidence also shows that the committee and defendant City of Hope have the same address in the City of Los Angeles, and that the written lease of the Shrine Auditorium for the 1950 fair was entered into by the committee as lessee rather than by defendant City of Hope, which was not a party thereto or mentioned therein.

[5, 6] The statement is frequently found in the cases that "The fact of agency where it rests in parol may be established at the trial by testimony of the agent himself." (Boone v. Hall (1950), 100 Cal.App.2d 738, 742, 224 P.2d 881, and cases there cited; Kast v. Miller & Lux (1911), 159 Cal. 723, 727-728, 115 P. 932; Montgomery v. Dorn (1914), 25 Cal.App. 666, 671, 145 P. 148; see also Mayfield v. Fidelity & Casualty Co. (1936), 16 Cal.App.2d 611, 617, 61 P.2d 83; Raftis v. McCloud River Lumber Co. (1917), 35 Cal.App. 397, 401, 170 P. 176; Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp. (1934), 1 Cal. 2d 121, 127, 34 P.2d 139.) Here, although there is no affirmative evidence that the agency relationship asserted to exist between defendant City of Hope and the committee rests in parol rather than in written form, nevertheless the testimony of the witness Goldsmith, who was vice president of the committee, as to the relationship between defendant and the committee, was received without objection by defendant. It is our view that his statements that the committee acts at defendant's direction and that "We only work for the" defendant and that "we were * * * the office which the

City of Hope use[d] on all occasions to raise the money," would support an inference that defendant held "the essential characteristic of the right of control" (Edwards v. Freeman (1949), 34 Cal.2d 589, 592, 212 P.2d 883 over the committee's activities, sufficient to constitute an agency relationship. Further evidence in support of the inference of agency is the testimony of plaintiffs as to the invitations and urging directed to them from defendant City of Hope to participate and work at the fair. It follows that the trial court erred in directing a verdict in favor of defendant, and that the judgment based thereon must be reversed.

A further contention advanced by plaintiffs is that they were erroneously refused permission to examine one Isadore Levitt, president of the Central Jewish Committee, under the provisions of section 2055 of the Code of Civil Procedure.³ Defendant points out that neither Levitt nor the committee was a party defendant and urges that Levitt did not bear such relationship to the sole defendant, City of Hope, as would entitle plaintiffs to examine him under section 2055. We deem it unnecessary to pass upon this contention at this time, inasmuch as upon a new trial other and different foundational evidence may be developed bearing upon the agency relationship between defendant and the committee and upon plaintiffs' right to call Levitt as an adverse witness.

The judgment is reversed. The purported appeals from the verdict and from the order denying plaintiffs' motion for a new trial are dismissed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR and SPENCE, JJ., concur.

3. When this case was tried, in 1952, section 2055 provided: "A party to the record of any civil action * * * or a person for whose immediate benefit such action * * * is * * * defended, or the directors, officers, superintendent,

member, agent, employee, or managing agent of any such party or person, * * * may be examined by the adverse party as if under cross-examination * * *

**LANGLEY v. PACIFIC GAS &
ELECTRIC CO.**

S. F. 18859.

Supreme Court of California.
In Bank.

Nov. 6, 1953.

Hearing Denied Dec. 3, 1953.

Action against electric company for damage sustained by customer as a result of failure to notify him of power failure. The Superior Court, Santa Clara County, Byrl R. Salsman, J., rendered judgment on a verdict for plaintiff, and defendant appealed. The Supreme Court, Traynor, J., held that electric company, knowing that customer depended upon continuous supply of power to provide fresh water for fish hatchery, failed to exercise reasonable care toward customer, when it did not notify him of power failure, and hence was liable for resulting damage, but that instruction erroneously limiting minimum damages recoverable required a retrial on issue of damages.

Judgment reversed with directions to retry issue of damages.

Edmonds, J., dissented in part.

Prior opinion 254 P.2d 915.

1. Evidence ⇨425, 442(1)

Parol evidence rule does not render inadmissible proof of contemporaneous oral agreements collateral to and not inconsistent with written contract, where written contract is either incomplete or silent on the subject and the circumstances justify inference that it was not intended to constitute a final inclusive statement of the transaction.

2. Electricity ⇨11(2)

Under rules of Public Utilities Commission, requiring power companies to furnish continuous and sufficient supply of electricity to customers but relieving company from liability for damage occasioned by interruption or insufficiency of service except that arising from failure to exercise reasonable diligence, a power company is not an insurer or guarantor of service, but such rules do not abrogate company's general duty to exercise reasonable care in operating its system to avoid unreasonable

risks of harm to persons and property of customers. Public Utilities Code, § 451.

3. Carriers ⇨95, 98

A common carrier is only required to exercise due diligence to deliver goods offered for shipment within a reasonable time in view of all the circumstances, but if carrier is aware that causes of unusual delay exist of which shipper is unaware and does not inform shipper of the facts, carrier is liable for injuries caused by delay that would otherwise be excusable.

4. Electricity ⇨11.1(1)

Where power company knew that customer depended upon continuous supply of electricity to provide fresh water for fish hatchery and company, though not responsible for power failure, was advised of it and could have notified customer in time to avert death of fish by taking proper precautions but failed to do so, company did not exercise reasonable care toward customer and was liable for resulting damage to customer. Public Utilities Code, § 451.

5. Electricity ⇨11.1(1)

Electric company is not required to give notice to customers of a power failure, in absence of knowledge of particular needs of a customer, and if it has such knowledge company is required only to act in a reasonable manner under the circumstances. Public Utilities Code, § 451.

6. Electricity ⇨11.1(1)

Requiring electric company, having actual notice of power failure, to make reasonable effort to give notice thereof to those customers who have informed company that they require notice to prevent serious loss in event of interruption of power supply is not unreasonable. Public Utilities Code, § 451.

7. Electricity ⇨11.1(1)

Requiring electric company to exercise reasonable diligence to give notice of power failure to those customers who have informed company that they require notice to prevent serious loss in event of interruption of power supply does not conflict with public policy that no public utility may grant any preference or advantage in its service to customers, since the same duty to exercise reasonable care and diligence is

owed to all customers similarly situated. Public Utilities Code, §§ 451, 453.

even though his testimony is not contradicted.

8. Electricity ⇨11.1(1)

By undertaking to supply electricity to customer, power company obligated itself to exercise reasonable care toward him, and failure to exercise such care had the characteristics of both a breach of contract and a tort. Public Utilities Code, § 451.

13. Appeal and Error ⇨1178(6)

Where verdict for plaintiff on issue of liability was amply supported by the evidence, erroneous instruction on issue of damages did not require a complete new trial, but only retrial of issue of damages.

9. Electricity ⇨11.1(3)

Where electric company knew of loss that might result from failure to give customer notice of power failure, measure of damages would be the same regardless of whether failure of company to exercise reasonable diligence in such respect be treated as a breach of contract or a tort, and where action was brought within period of shortest applicable statute of limitations, any error in pleading company's failure to give notice as a breach of contract rather than as negligence was not prejudicial to company. Public Utilities Code, § 451, Civ.Code, §§ 3300, 3333.

10. Appeal and Error ⇨1064(2)

In action against electric company for loss sustained by customer as a result of power failure, instructing jury with respect to alleged oral agreement to notify such customer of any interruption of service was not prejudicial to defendant, since jury, in returning verdict for plaintiff, necessarily found that defendant was aware of customer's need for notice of power failure, but failed to give such notice, and that such failure was the proximate cause of loss. Public Utilities Code, § 451.

11. Appeal and Error ⇨1062(3)

Trial ⇨144

Where amount of damages sustained by plaintiff as a result of death of several thousand fish in hatchery was placed in issue by answer, instructing jury as to minimum amount that could be awarded plaintiff for each fish lost, if jury found in favor of plaintiff, was prejudicial error, though plaintiff's testimony as to value of fish was uncontradicted.

12. Evidence ⇨594

Trial ⇨140(1)

Jury is the sole judge of the credibility of witnesses and may disbelieve a witness,

Robert H. Gerdes, San Francisco, Campbell, Custer, Warburton & Britton, San Jose, W. R. Dunn, San Francisco, and Austen D. Warburton, San Jose, for appellant.

James F. Boccardo, San Jose, and Edward J. Niland, Santa Clara, for respondent.

TRAYNOR, Justice.

Plaintiff Bert Langley brought this action against defendant Pacific Gas and Electric Company for breach of a contract wherein defendant allegedly agreed to furnish plaintiff with power necessary to operate plaintiff's fish hatchery, and in the event that delivery of power was suspended, to give reasonable notice of such suspension to plaintiff. The evidence at the trial established that a power failure occurred, that defendant did not give plaintiff notice of such failure, and that as a result 78,000 of plaintiff's trout died. Plaintiff recovered judgment for \$12,480 pursuant to a jury verdict. Defendant appeals, contending that it did not breach any contractual duty to plaintiff and that the trial court erroneously instructed the jury.

Plaintiff built his hatchery in 1947. At the time of the accident he had about 80,000 trout, in seven concrete troughs, sixteen feet long, sixteen inches wide, and eight inches deep. It was necessary to have a continuous flow of running water in the troughs to supply oxygen to the trout. If the flow of water were cut off, the trout would die in from twenty to thirty minutes. Plaintiff supplied water to the troughs by gravity flow from a reservoir that was kept full by an electric pump. The pump would automatically start and refill the reservoir when the water dropped to a certain level. The reservoir contained enough water to supply the troughs for about three

and a half hours after the pump stopped. Plaintiff did not have a standby pump at the hatchery. If the power were shut off or the pump failed for any other reason, plaintiff was prepared to protect the trout in two ways. He could lessen the flow of water from the reservoir to the troughs, so that the water would not be exhausted until about eight hours had passed. If it appeared that the pump could not be operated within that time, he had made arrangements for getting a portable gasoline power plant and pump within an hour.

In 1947 plaintiff made arrangements with defendant for his power supply. Plaintiff testified that he told defendant's employees the nature of his business and of his need for a continuous supply of running water. He asked whether "you people have a man here, or service 24 hours a day, whereby I could receive notice in the event that there is to be a suspension of power * * *. Otherwise, I will put in a gasoline pump." The employees orally assured plaintiff that he would be notified. Defendant began supplying plaintiff with power in October, 1947. Apparently a written contract was signed, although neither party produced it or a copy thereof at the trial. Early in 1948 plaintiff read in a newspaper that there was a power shortage. He told one of defendant's employees that he wished to be notified when there was a "brownout" and his power was cut off. He gave the employee his telephone number. On two occasions he received a notice from an employee, who stated that she had instructions to notify him when power was suspended, that on a certain date on a cer-

tain hour power would be suspended in his area, and that he should govern himself accordingly. Plaintiff took appropriate precautions.

In the spring of 1948 plaintiff substituted a three horsepower electric motor for the smaller motor that he had previously used. He asked defendant to supply him with additional power. On May 12, 1948, he signed a written agreement for the additional power at a rate different from that under the former arrangement. The agreement provided that defendant would furnish the electricity in accordance with the applicable rules and regulations of the Public Utilities Commission. Rule 14 of the Commission, relied upon by defendant, is set forth in the footnote.¹ It is not clear from the record whether at the time this contract was executed defendant's employees renewed their oral assurance that plaintiff would be given notice if the power failed; in any event, he assumed that the previous oral agreement was still in effect.

Power failed in plaintiff's area at some time before 12:01 a. m. on July 5, 1951. At 12:01 a. m. an unknown person called the telephone operator at defendant's office and informed her that the power was off. The operator promptly called the repair crew. Defendant's employees patrolled the area until they located the cause of the failure, a nonoperating voltage regulator. They by-passed the regulator and restored service at about 5:15 a. m. Defendant's employees did not at any time notify plaintiff that the power had failed. Plaintiff was at home that night and would have

I. "Shortage of Supply and Interruption of Delivery

"The Company will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electric energy to the customer, but does not guarantee continuity or sufficiency of supply. The Company will not be liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind or character occasioned thereby, if same is caused by inevitable accident, act of God, fire, strikes, riots, war, or any other cause except that arising from its failure to exercise reasonable diligence.

"The Company, whenever it shall find it necessary for the purpose of making repairs or improvements to its system, will have the right to suspend temporarily the delivery of electric energy, but in all such cases, as reasonable notice thereof as circumstances will permit, will be given to the customers, and the making of such repairs or improvements will be prosecuted as rapidly as may be practicable, and, if practicable, at such times as will cause the least inconvenience to the customers."

See 44 C.R.C. 718, 719; 17 C.R.C. 143, 154.

answered the telephone had he been called. When plaintiff arrived at the hatchery the following morning, 78,000 of his 80,000 trout were dead.

Plaintiff brought this action for breach of an "oral and written" contract whereby defendant allegedly promised to give him reasonable notice in the event that it was necessary to suspend delivery of electricity. Plaintiff took the position at the trial that the cause of the power failure was immaterial, and in effect conceded that defendant had exercised due diligence in supplying him with electricity and in restoring service after the failure. Defendant's motions for judgment on the pleadings, a nonsuit, and a directed verdict were denied, and the cause was submitted to the jury. The jury returned a verdict in favor of plaintiff, awarding damages at \$12,480. Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied. Defendant appeals from the judgment entered on the verdict.

[1] Defendant contends that the trial court should not have admitted evidence of the oral negotiations and agreements preceding execution of the written contract on May 12, 1948, on the grounds that this instrument must be deemed to be the complete expression of the agreement of the parties, and that parol evidence is therefore inadmissible to vary or contradict its terms. See, *Guerin v. Kirst*, 33 Cal.2d 402, 410, 202 P.2d 10, 7 A.L.R.2d 922; *Miller v. Security-First Nat. Bank of Los Angeles*, 219 Cal. 120, 128, 25 P.2d 420; *Parker v. Meneley*, 106 Cal.App.2d 391, 399, 235 P.2d 101. Plaintiff, on the other hand, contends that evidence of the oral agreement in the present case was properly admitted, relying on the rule that the parol evidence rule does not "render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract where the latter is either incomplete or silent on the subject, and the circumstances justify an inference that it was not intended to constitute a final inclusive statement of the transaction." *Ellis v. Klaff*, 96 Cal.App.2d 471, 476, 216 P.2d 15, 19; *Stockburger v. Dolan*, 14 Cal.2d 313, 317, 94 P.2d 33, 128 A.L.R. 83; *Craw-*

ford v. France, 219 Cal. 439, 443-445, 27 P.2d 645. It is unnecessary, however, to resolve these contentions if it is determined that under the written contract defendant assumed the duty to exercise reasonable diligence to notify plaintiff of any interruption in the supply of power. Accordingly, the first question presented for determination is the extent of defendant's obligations under the written contract.

[2] As noted above, defendant agreed to furnish electricity in accordance with the applicable rules and regulations of the Public Utilities Commission. Rule 14 requires defendant to exercise "reasonable diligence and care" to furnish a continuous and sufficient supply of electricity to its customers. It further provides that defendant shall "not be liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind or character occasioned thereby * * * except that arising from its failure to exercise reasonable diligence." Defendant contends that under these provisions its duty is limited to exercising reasonable diligence to furnish a continuous and sufficient supply of electricity, and that it is under no duty to exercise reasonable care or diligence to prevent loss from power failure when it is not legally responsible for the power failure itself. These provisions deal with the duty to supply power, and they make clear that defendant is not an insurer or guarantor of service. In no way, however, do they abrogate defendant's general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to the persons and property of its customers. See, *Public Utilities Code*, § 451.

[3] In the present case it is undisputed that defendant was not responsible for the power failure and that it exercised reasonable diligence to restore service. Accordingly, the question presented is whether on the record before us it could reasonably be concluded that its duty to exercise due care toward plaintiff in the operation of its system required it to give notice of the power failure when it knew that the failure to give notice would result in serious loss.

In an analogous situation, a common carrier does not have a duty to transport goods immediately, but merely to use due diligence to deliver goods offered for shipment within a reasonable time in view of all the circumstances. Nevertheless, it is the general rule that if the carrier is aware that causes of unusual delay exist of which the shipper is unaware, and does not inform the shipper of the facts, the carrier is liable for injuries caused by delay that would otherwise be excusable. *Eastern Railway Co. of New Mexico v. Littlefield*, 237 U.S. 140, 145, 35 S.Ct. 489, 59 L.Ed. 878; *Joynes v. Pennsylvania R. Co.*, 235 Pa. 232, 237, 83 A. 1016; *Southeastern Express Co. v. Bowers, Inc.*, 21 Tenn.App. 295, 109 S.W.2d 851, 854-855; see, 4 *Williston on Contracts*, § 1095, p. 3074.

[4] In the present case, defendant knew that a continuous supply of electric current to plaintiff was imperative. It knew that it could assure that supply either by furnishing the current itself or by promptly notifying plaintiff of any failure so that he could obtain a substitute supply. Twice, in fact, defendant did notify plaintiff of an interruption in its service. Plaintiff had given defendant his telephone number. The repairman who restored service was called to duty by a night telephone operator at defendant's office. Had that operator been given a list of customers to call in the event of a power failure, the loss to plaintiff would have been averted. Under these circumstances defendant failed to exercise reasonable care toward plaintiff.

[5,6] Defendant contends, however, that it is physically impossible for it to first ascertain the loss that may occur to each of its million customers in the event of a power failure, and then to take steps, other than diligent efforts to restore service, to diminish or prevent such losses. Defendant is under no duty to do so. In the absence of knowledge of the particular needs of a customer, a utility is not required to give notice of a power failure. *Brame v. Light, Heat & Water Co.*, 95 Miss. 26, 33, 48 So. 728, 21 L.R.A.,N.S., 468; *Stroup v. Alabama Power Co.*, 216 Ala. 290, 113 So. 18, 20. If it has such knowledge, it is required only to act in a reasonable manner

under the circumstances. It would not be unduly burdensome to a utility, at least in a case where, as here, a telephone operator is on duty and the utility has actual knowledge of the power failure, to require it to make a reasonable effort to give notice to those customers who have informed it that they require notice to prevent serious loss in the event of an interruption in the power supply.

[7] Defendant contends that to require it to give notice to certain customers and not to others conflicts with the public policy of this state that no public utility may grant any preference or advantage in its service to its customers. Public Utilities Code, § 453. Discrimination is not present, however, since the same duty to exercise reasonable care and diligence is owed to all customers similarly situated. See, *Humphreys v. Central Kentucky Natural Gas Co.*, 190 Ky. 733, 740, 229 S.W. 117, 21 A. L.R. 664.

[8,9] Defendant contends that unless the duty to give notice is expressly provided for in its contract with plaintiff, recovery cannot be had in an action on the contract but only in an action in tort for negligence. By undertaking to supply electricity to plaintiff, defendant obligated itself to exercise reasonable care toward him, and failure to exercise such care has the characteristics of both a breach of contract and a tort. For certain purposes, such as the statute of limitations, whether an attachment may issue, and the measure of damages, it may be necessary to classify an action such as this one as in contract or in tort. See generally, *L. B. Laboratories, Inc., v. Mitchell*, 39 Cal.2d 56, 61-63, 244 P. 2d 385. In the present case, however, it is immaterial whether the failure to exercise reasonable diligence to notify plaintiff be treated as a breach of contract or a tort. The action was brought within the period of the shortest applicable statute of limitations, and since defendant knew of the loss that might result from its failure to give notice, the measure of damages under either theory is the same. Civ.Code, §§ 3300, 3333; see, *Siminoff v. Jas. H. Goodman & Co. Bank*, 18 Cal.App. 5, 15, 18, 121 P. 939. Accordingly, whether or not plaintiff erred

in pleading defendant's failure to give notice as a breach of contract rather than as negligence, defendant was not prejudiced. Under either theory it was under a duty to exercise reasonable diligence to notify plaintiff of the power failure.

[10] In addition to instructing the jury on the theory that defendant was under a duty to exercise reasonable diligence to give notice, the trial court gave instructions with respect to the alleged oral promise that bound defendant to give notice. On either theory the jury, in returning a verdict for plaintiff, necessarily found that defendant was aware of plaintiff's need for notice of a power failure, that it failed to give him notice, and that its failure was the proximate cause of the death of the trout. It is undisputed that defendant knew of the power failure and made no effort to notify plaintiff. Under these circumstances defendant failed to exercise reasonable care and diligence, and any error in instructing with respect to the oral agreement was not prejudicial. *Heple v. Kluge*, 114 Cal.App.2d 473, 482-483, 250 P.2d 694.

[11-13] Defendant contends that the instruction that if the jury returned a verdict in favor of plaintiff, "you cannot award the plaintiff any less than sixteen cents per fish", was prejudicially erroneous. We agree. The amount of damages sustained by plaintiff was placed in issue by the answer to the complaint. The instruction removed that issue from the consideration of the jury. Although plaintiff's testimony was the only evidence concerning the value of the fish, the jury was the sole judge of his credibility and should have been left free to disbelieve him. *Blank v. Coffin*, 20 Cal.2d 457, 461, 126 P.2d 868. On cross-examination it was shown that plaintiff was not experienced in the business of raising fish. The erroneous instruction on the issue of damages does not require a complete new trial, since the verdict of the jury on the issue of liability is amply supported by the evidence.

The judgment is reversed and the trial court is directed to retry the issue of damages only. Each party is to bear its own costs on appeal.

GIBSON, C. J., and SHENK, CARTER, SCHAUER and SPENCE, JJ., concur.

EDMONDS, Justice (dissenting).

I concur in the conclusion that the instruction concerning the measure of damages was prejudicially erroneous, but I dissent from the order directing that a new trial be limited to the issue of damages only.

The complaint alleged that the "plaintiff and the defendant entered into an oral and written contract, whereby defendant agreed to furnish to plaintiff the necessary power for the operation of plaintiff's fish hatchery, and further agreed that in the event it was necessary to suspend temporarily the delivery of electric energy, said defendant would give a reasonable notice to plaintiff. * * * That on or about the 4th of July, 1948, defendant without warning to plaintiff did cause an interruption in the supply of electrical power to plaintiff's fish hatchery, and that as a direct result thereof and before plaintiff could take the necessary steps for the protection of the fish contained in said fish hatchery, some 78,000 rainbow trout died from lack of fresh water."

These allegations state no cause of action either in contract or in tort. They include no statement that the power company did not give notice, as it assertedly promised to do, nor do they charge it with any failure to exercise reasonable diligence.

The case was tried upon the theory that the power company was liable under the terms of the oral contract relied upon by Langley. As stated by his counsel in resisting a motion for a judgment on the pleadings, "The issue is simple. There was an agreement to give this man notice that the power was disconnected; the power was disconnected, and he wasn't given notice. I don't know how else you could say it." Similar statements were made by him in his opening statement to the jury, in his closing argument, and in resisting a motion for a directed verdict. In connection with this last proceeding, counsel for the power company asked: "In order that we may put in our defense, will the Court indicate the theory upon which we may be held

liable?" The court's reply was: "The plaintiff's testimony shows * * * the plaintiff's claim of an oral agreement."

The issue of the power company's liability was submitted to the jury under alternative theories of recovery. By one instruction, the jurors were told: "In addition to the terms of the written contract, there is evidence of an oral agreement between the parties providing for the giving of notice to the Plaintiff by the Defendant in the event of any interruption of power. If you find that such an agreement existed, the duty and obligation of the Defendant to give such notice cannot be excused by any circumstances, and if you find that the Defendant made such an agreement and then failed to fulfill it and, as a result thereof, the Plaintiff sustained damage, your verdict must be in favor of Plaintiff. * * *"

A rule of the Public Utilities Commission, which by statute was a part of the written contract for service to Langley, stated the duties of the company in the event of an interruption in the delivery of power. The contract, as enlarged by the rule, provided for the very contingency which is the basis of the cause of action, and parol evidence was not admissible to prove a collateral oral agreement relating to the same subject. *Kunz v. Anglo & London Paris Nat. Bank*, 214 Cal. 341, 346-347, 5 P.2d 417; *Pacific States Securities Co. v. Steiner*, 192 Cal. 376, 220 P. 304; *Heffner v. Gross*, 179 Cal. 738, 742, 178 P. 860; *United Iron Works v. Outer Harbor, etc., Co.*, 168 Cal. 81, 84-85, 141 P. 917; *Germain Fruit Co. v. J. K. Armsby Co.*, 153 Cal. 585, 594, 96 P. 319. Accordingly, evidence as to a contemporaneous oral agreement was erroneously admitted, and an instruction upon that theory should not have been given.

The jurors were also instructed that by the written contract of the parties, the power company was liable for any loss or damage occasioned by the interruption of power if such loss or damage was caused by the failure to exercise reasonable diligence. They were told that, in appraising the conduct of the company, they should determine whether it knew of the hazardous nature of Langley's business and whether it reasonably should have foreseen that an interrup-

tion in the supply of current would result in loss to him.

In deciding in favor of Langley upon the issue of liability, the majority say that there is no necessity to decide the question as to the admissibility of the parol evidence "if * * * under the written contract defendant assumed the duty to exercise reasonable diligence to notify plaintiff of any interruption in the supply of power." It has been held that "[i]n cases where it clearly appears that the jury did not rely upon the erroneous instructions, the judgment may be affirmed on the ground that the error is not prejudicial". *Oettinger v. Stewart*, 24 Cal.2d 133, 140, 148 P.2d 19, 23, 156 A.L.R. 1221. But here the record does not show that situation. Instead, it shows that the case was tried by counsel for both parties solely as one for damages arising from the asserted breach of an oral contract to give notice.

The basis for the conclusion that the erroneous instruction as to the oral contract was not prejudicial is quite uncertain. Reference is made to *Heple v. Kluge*, 114 Cal. App.2d 473, 250 P.2d 694, in which it is stated that an erroneous instruction is not prejudicial "when the facts as to which the charge is made are admitted or uncontradicted, or where no other conclusion could be reasonably made from the evidence." 114 Cal.App.2d at page 483, 250 P.2d at page 701. Apparently, then, the power company is held liable upon the ground that, as a matter of law, the evidence shows a duty to exercise reasonable diligence to prevent damage by giving Langley reasonable notice of any interruption in the supply of power.

In challenging the propriety of the instruction which stated that it "was liable for any loss or damage occasioned by the interruption of power if such loss or damage was caused by the failure to exercise reasonable diligence", the power company points to the written contract which provides that "The Company will not be liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind or character occasioned thereby, if same is caused by inevitable accident * * or any other cause except that arising from its failure to exercise reasonable diligence."

That this provision of itself does not create the duty stated in the instruction, apparently is conceded in the opinion in which it is stated: "These provisions deal with the duty to supply power, and they make clear that defendant is not an insurer or guarantor of service. In no way, however, do they abrogate defendant's general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to the persons and property of its customers. See, Pub. Utilities Code, § 451." It appears, therefore, that the basis of the determination of liability is not a duty specifically created by the contract, but instead a general statutory one requiring a public utility to exercise reasonable care toward its customers, and the written contract is of importance only to prove such a relationship.

No case is cited which holds that a power company may be held liable for a failure to notify customers of an accidental interruption of the supply of electricity, as opposed to a situation where the company suspends the supply of power to effect repairs or for a similar purpose. *Brame v. Light, Heat & Water Co.*, 95 Miss. 26, 48 So. 728, 21 L.R.A., N.S., 468, and *Stroup v. Alabama Power Co.*, 216 Ala. 290, 113 So. 18, are cases in the latter category. Nor is such a charge made in the complaint, which alleges only that the "plaintiff and the defendant entered into an oral and written contract, whereby defendant * * * agreed that in the event it was necessary to suspend temporarily the delivery of electric energy, said defendant would give a reasonable notice to plaintiff. * * *"

The complaint states no cause of action whatever, but the case was tried upon the theory that the power company had made an oral contract to give notice to Langley which it failed to fulfill. Evidence in support of such theory was received erroneously by the trial court and the jury instructed to return a verdict for Langley if it found that such a contract was made and breached. The jurors were also told that, by the written contract, the power company was liable to Langley for damages to his property because of a failure to exercise reasonable diligence "to notify him that the

power was off". That instruction states a theory of recovery inconsistent with the one based upon an oral contract under which a failure to give notice was said to be inexcusable "by any circumstances".

It is now held that evidence offered to prove an oral contract might properly have been considered by the jury as the basis of liability upon the inconsistent theory of liability under the written contract. For that reason, the liability of the power company is said to now be established as a matter of law, under a theory not pleaded in the complaint nor relied upon by the parties at the trial and upon which the jury was not instructed.

Under certain circumstances, an appellate court may hold, as a matter of law, that specific conduct does or does not amount to reasonable care toward a plaintiff. Cf. *Pirkle v. Oakdale Union Grammar School Dist.*, 40 Cal.2d 207, 253 P.2d 1; *Gray v. Brinkerhoff*, 41 Cal.2d 180, 258 P.2d 834. But in those cases, the issue of the reasonableness of the conduct involved was presented by the pleadings and considered by the parties with full opportunity to present evidence upon it. The present record shows an entirely different situation.

I would reverse the judgment without qualification.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.



121 Cal.App.2d 396

WAMPLER et al. v. MULLER et al.

Civ. 4717.

District Court of Appeal, Fourth District,
California.

Nov. 19, 1953.

Automobile collision case wherein motion for new trial was made by defendants after verdict for plaintiffs. The Superior Court of Orange County, Raymond Thompson, J., entered an order striking statement of disqualification of Raymond Thompson as judge, and order granting motion for new trial, and plaintiffs appealed. The District Court of Appeal, Griffin, J., held that judge, who had indicated that he might

not be available to hear motion for new trial, was not disqualified by having reduced to writing and filed in record his opinion that motion for new trial had more than usual merit, and that jury's conclusion was hard to understand under the evidence.

Orders affirmed.

Judges ⇨49(2)

Trial judge who, after indicating that he would probably not be available to hear motion for new trial, reduced to writing and filed in record his opinion that motion had more than usual merit, and that jury's conclusion was hard to understand under evidence as he interpreted it, was not thereby disqualified from hearing motion for new trial upon his availability at time for hearing.

John Lewis King, of King & Mussell, San Bernardino, for appellants.

Forgy, Reinhaus, Miller & Kogler, and William F. Wenke, Santa Ana, for respondents.

GRIFFIN, Justice.

Plaintiffs recovered a jury verdict for \$26,400 against defendants arising out of an automobile collision. A motion for new trial was made by defendants. The trial judge, Thompson, left the county on account of a death in his family. He believed that he would not be back in time to hear the motion and felt that another judge might be called in to hear it before he returned. He filed a memo in the case and sent copies of it to counsel on each side, in which he stated:

"The motion for a new trial in this case has more than usual merit.

"The jury's conclusion that plaintiff was not guilty of contributory negligence is hard to understand. Plaintiff entered the intersection where there was a stop sign and where the view is obstructed until she was out in the intersection. Defendant, it may fairly be found, was traveling too fast, yet it would seem that had plaintiff used ordinary care in observing the roadway in the direction of defendant's car, she would have perceived the

hazard and would not have driven into its path.

"The amount of damages also requires consideration. It is my view that Dr. Hawkins indulged in speculation and possibilities rather than reasonably certain medical opinions. In my opinion, Dr. Huffman presented plaintiff's injuries in their proper light."

Later, counsel for plaintiffs, before Judge Gardner, moved to strike the memo from the files and it was so stricken. That judge suggested that he await the preparation of a transcript before ruling on the motion for new trial. Counsel for plaintiffs stated that no transcript was being prepared and suggested that Judge Gardner might be prejudiced by reason of having read the memo which was filed by Judge Thompson. He then stated that he would arrange for an out-of-county judge to hear it on a day certain. On May 21, Judge Thompson returned to the county, called respective counsel by telephone, and advised them that he had returned and would hear the motion for new trial on June 4th. Notice of such hearing was given. Counsel for plaintiffs subsequently filed an "objection to hearing of the motion for new trial" by Judge Thompson upon the ground that he was disqualified. He set forth the facts above stated in reference to the filing of the memo in the record and the mailing of copies to each counsel, and claimed that by reason thereof Judge Thompson was prejudiced in favor of the moving parties and against the plaintiffs because he had given advice in writing to them involving matters in the proceeding for a new trial.

It was conceded that no answer or reply by the trial judge was filed. On May 29th, counsel for defendants filed a motion before Judge Morrison to strike the statement of disqualification of Judge Thompson on the ground that it contained no statement of facts adequate or proper to disqualify the trial judge under section 170 of the Code of Civil Procedure. On June 4th, the day set for the hearing, that judge struck the disqualifying affidavit from the record and transferred the matter to Judge

Thompson's court for hearing on the motion for new trial, and it was granted on the ground of insufficiency of the evidence to support the verdict.

The main question on this appeal is whether the objections, as filed, stated a ground sufficient, under section 170 of the Code of Civil Procedure, to disqualify the trial judge from hearing the motion for new trial. If it did, the order of the trial judge granting a new trial was of no force or effect. Otherwise, it was a valid order and the sufficiency of the evidence may be reviewed on an appeal from it.

We are not here confronted with the problem that may have arisen if another judge had heard the motion for new trial after reading the memo filed by the trial judge. The ultimate question here to be determined is whether the facts related would support a finding that the trial judge was disqualified by reason of stating to counsel for the respective parties in writing and filing the original in the record, that it was his belief, after hearing the entire testimony, that the motion had more than usual merit; that the jury's conclusion was hard to understand under the evidence as he interpreted it, and that the amount of damages allowed required further consideration.

It must be conceded that had the trial court made this announcement orally to counsel in the courtroom after the jury returned its verdict, under the authority of *People ex rel. Department of Public Works v. McCullough*, 100 Cal.App.2d 101, 223 P.2d 37, and cases cited, no sufficient prejudice of the court against the moving parties could be legally claimed. However, plaintiffs claimed that Judge Thompson was disqualified for the reason that he was biased and prejudiced in favor of the moving party and against the plaintiffs by reason of his additional act of reducing his opinion to writing for the purpose of influencing another judge in a subsequent hearing.

In *McEwen v. Occidental Life Insurance Co.*, 172 Cal. 6, 155 P. 86, 87, decided by our Supreme Court, in much stronger language the trial judge indicated his feelings in reference to the verdict of the jury.

There the affidavit recited that when the verdict was returned the trial judge appeared to be very angry and before the verdict was read aloud he turned to one of the attorneys for the defendant and said:

"I will entertain a motion for new trial upon the minutes of the court at any convenient time. I do not see how the jury could possibly have reached this verdict."

The Supreme Court there said: "The vexation of the judge and his remark * * * does not show prejudice against Mrs. McEwen. These things indicated, perhaps, that he had formed an opinion regarding the legal questions which had been presented in the case and in reference to the sufficiency of plaintiff's proof. Such conviction in the mind of the judge, based upon his actual observation of the witnesses, the hearing of their testimony, and his knowledge of the law applicable to such cases does not amount to that prejudice against a litigant which the statute contemplates as a basis for change of venue * * *."

We do not see how the reduction of the trial judge's opinion to writing and filing it in the record would add any strength to the affidavit which would support the ground for holding that by reason thereof the trial judge was prejudiced against the moving party.

In *Francis v. Superior Court*, 3 Cal.2d 19, 28, 43 P.2d 300, 305, in applying the rules under Section 661 of the Code of Civil Procedure requiring that a motion for new trial shall be made before the judge who presided at the trial, if available, the court said: "we think that the very essence of this enactment is that the motion for the new trial shall be heard and determined whenever practicable by the judge who had heard the evidence at the trial of the case, and who was therefore best prepared and qualified to pass upon the merits of the motion." Under the decisions the court was justified in striking the affidavit and ruling on the motion for new trial.

Plaintiffs do not refer us to any record of the testimony taken at the trial indicat-

ing that the court erred in granting the motion for new trial on the ground of the insufficiency of the evidence. From a mere observation of a summary of the evidence gleaned from the memo prepared by the trial court, the evidence would authorize the granting of a new trial.

The order striking the statement of disqualification and the order granting a new trial are affirmed.

BARNARD, P. J., concurs.

MUSSELL, J., deeming himself disqualified, does not participate herein.



121 Cal.App.2d 185

GILLETTE v. NICOLLS.

Civ. 4812.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1953.

Rehearing Denied Dec. 2, 1953.

Action by surviving joint tenant to quiet title to property involving validity of deed executed by deceased joint tenant in favor of brother. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment cancelling and setting aside deed, and brother appealed. The District Court of Appeal, Mussell, J., held that evidence sustained finding that deed was procured by undue influence.

Affirmed.

1. Quieting Title ⇨43

Where grantee raised issue of validity of deed from deceased cotenant in his answer to surviving cotenant's action to quiet title, surviving cotenant could assert that deed was procured by fraud and undue influence.

2. Appeal and Error ⇨883

Where grantee of deceased cotenant's deed permitted issue of validity of deed to

be litigated on trial, grantee could not on appeal claim that issue of validity of deed was not properly before court because not pleaded.

3. Deeds ⇨211(4)

In action by surviving cotenant to quiet title, involving validity of deed executed by deceased cotenant, evidence sustained finding that deed was procured by undue influence.

4. Deeds ⇨196(2, 3)

Where relationship of brother and sister existed between cotenant and her grantee, presumption of invalidity existed concerning deed, and presumption could be rebutted only by clear evidence that entire transaction was fair and equitable, and that cotenant at time of transaction fully understood nature of instruments executed by her, and that no advantage had been taken of confidential relationship.

5. Joint Tenancy ⇨5

Joint tenants may contract with each other concerning exclusive possession of, and division of income from their joint property, without necessarily terminating joint tenancy.

6. Joint Tenancy ⇨5

Agreement entered into by joint tenants to effect that as long as their mother lived things should continue as of "present time," and that brother was to have free living quarters for his lifetime on joint property, did not affect joint tenants' title to property involved, and did not terminate joint tenancy.

Stanford & McDonough, San Diego, for appellant.

Vincent Whelan, San Diego, for respondent.

MUSSELL, Justice.

This is an action to quiet title to real property in the city of San Diego. Plaintiff's claim to title is based upon a joint tenancy deed executed by her sister, Mary M. Nicolls, on February 1, 1951. Mary M. Nicolls died on or about July 24, 1951, and title to the property thereupon passed to plaintiff as the surviving joint tenant.

On or about April 23, 1951, while Mary was ill and in a sanitarium, her brother, John, the defendant in this action, visited her and complained to her about having no part in her estate and stated that he felt he should be her sole heir. Mary then prepared and signed the following writing:

"Monday—April 23/51

An Agreement

Re Nicolls Real Estate in S. D.

In order to avoid as much misunderstanding as possible and to add to the happiness & security of all we agree to the following and set our signatures to this paper to confirm our intention of carrying out the following suggestions—

(1) So long as Mother lives things shall continue as of the present time—

(2) After Mother's death, Evelyn shall take over complete management of said property—

(3) John is to have an apartment or whatever living quarters are used in the new investment—since it quite likely that a property with *more* rentals can be had in exchange or in place of for present property—

(4) After Mother's death John is to have a *life long interest* in an adequate place to live *rent free* and to share with Mary Elizabeth equally if Evelyn should pass on unexpectedly.

/s/ Mary M. Nicolls

/s/ Evelyn Gillette

Nothing in the above shall keep Evelyn and John from making additional plans if they so wish—"

This document was signed by the plaintiff, at Mary's request, and was delivered to the defendant herein. Thereafter, the defendant told Mary that this writing was worthless and that he would see an attorney for the purpose of having documents prepared which would be valid to carry out the intentions which she had expressed in the writing of April 23, 1951. On or about July 9, 1951, defendant procured and presented to Mary for execution a grant deed conveying the property involved to him. This deed was executed and acknowledged by Mary Nicolls on July 9, 1951, and a will also prepared by defendant was signed by

her at the same time. Elizabeth Nicolls, the mother of Mary and the parties to this action, died on July 10, 1951.

Defendant admits that plaintiff is the owner of an undivided one-half interest in the subject property but contends that he is the owner of the remaining one-half interest by virtue of the deed of July 9, 1951.

The trial court found that at the time of the signing of said deed plaintiff and Mary Nicolls were the owners as joint tenants of the property described therein; that by the quoted instrument of April 23, 1951, Mary Nicolls and defendant intended to and did agree as follows: "That during the lifetime of their mother the title to the real property hereinbefore described should remain as it then was in joint tenancy between the plaintiff and said Mary M. Nicolls; that both the plaintiff and said Mary M. Nicolls agreed thereby not to partition said real property during their joint lives, nor to destroy the existing joint tenancies; and that so long as they jointly or either of them held title to said real property, the defendant should be entitled to occupy an apartment in said real property free of rent, after the death of the mother of the plaintiff and defendant and said Mary M. Nicolls and that in the event said real property should be sold and the proceeds reinvested in another apartment house, that plaintiff or said Mary M. Nicolls would, after the death of their mother, furnish to the defendant an apartment or living quarters in such new investment free of rent; * * * that a prima facie proof has been made that the defendant exercised undue influence upon said Mary M. Nicolls in obtaining the preparation, signing and delivery of the deed hereinbefore referred to; that such prima facie proof of undue influence has not been overcome by the defendant; and that said deed was signed and delivered by said Mary M. Nicolls as the result of undue influence exercised upon her by said defendant." The court further found that on April 23, 1951, and at all times thereafter, the defendant had knowledge of the fact that the plaintiff and Mary M. Nicolls had executed the contract dated April 23, 1951, hereinbefore referred to, and knew the contents of said contract, and

had notice of its effect, and thereby was charged with the knowledge that said Mary M. Nicolls had, by said contract agreed that the title to the real property herein referred to was to remain undischarged by the voluntary act of either of the parties to said contract; that the deed signed by said Mary M. Nicolls, to the defendant as grantee, was in violation of said contract of April 23, 1951; and that the defendant, by reason of said facts, was and is bound by said contract of April 23, 1951; that the plaintiff is the owner of the real property hereinbefore described, subject to the right of the defendant to occupy personally an apartment in said real property rent free, so long as the plaintiff shall continue to own said property; and that should plaintiff sell said property and reinvest the proceeds in another apartment house that she is obligated to furnish to defendant an apartment or living quarters in such new investment rent free.

The trial court rendered judgment canceling and setting aside the deed of July 9, 1951, and further decreed that defendant is estopped to assert the validity of said deed; that he does not have any right, title or interest in the property except the right to occupy personally an apartment in said real property, rent free during his lifetime, so long as the plaintiff shall continue to own said property; that should plaintiff sell or dispose of said property and reinvest the proceeds in another apartment house, that plaintiff shall furnish to the defendant an apartment or living quarters in such investment free of rent.

[1-4] Defendant first contends that plaintiff does not have standing in court to contest the validity of the deed of July 9, 1951. However, in *Reina v. Erassarret*, 90 Cal.App.2d 418, 203 P.2d 72, 7 A.L.R.2d 1309, this court held that a surviving joint tenant may maintain an action to set aside a conveyance obtained from his deceased cotenant by fraud and undue influence. In the instant case, defendant having raised the issue of the deed in his answer cannot complain that plaintiff made such defenses thereto as were available to her. Defendant, having permitted this issue to be litigated, cannot on appeal escape the conse-

quences by claiming that such issue was not pleaded. The trial court could not determine the respective rights of the parties without determining the effect and validity of the deed of July 9 and the agreement of April 23, 1951. *Hernandez v. Hernandez*, 109 Cal.App.2d 903, 910, 242 P.2d 59. While the complaint herein and the amendments thereto might have been more carefully drawn, sufficient facts were alleged and proved to support a finding of undue influence. There is substantial evidence in the record that Mary had confidence in and trusted her brother, John; that he advised her that the agreement of April 23, 1951, "would not hold water"; that he then stated to her that he would have documents prepared to carry out her intentions; that he procured a deed to the property from her and the execution of a will. That she did not understand the nature of these documents was shown by the testimony of her physician who was present when these instruments were signed by her. Under these circumstances an inference arises capable of sustaining a finding that undue influence was used. *Olson v. Washington*, 18 Cal. App.2d 85, 87-88, 63 P.2d 304. There was a presumption of invalidity in the execution of the deed and will which, while rebuttable, could only be overcome by clear and satisfactory evidence that the transaction was fair and equitable; that Mary fully understood the nature of the instruments executed by her; and that no advantage had been taken of the confidential relationship which existed. In *re Estate of Hamaker*, 114 Cal.App.2d 533, 540, 541, 250 P.2d 637.

[5,6] Defendant argues that the trial court erroneously construed the agreement of April 23, 1951, as a contract between joint tenants to maintain the joint tenancy until the death of one of them. This argument is without merit. The agreement involved does not contain language indicating that the parties thereto intended to destroy the existing joint tenancy and the construction adopted by the trial court is reasonable under the circumstances. As was said in *Hammond v. McArthur*, 30 Cal. 2d 512, 516, 183 P.2d 1, 3:

"* * * joint tenants may contract with each other concerning the exclusive possession and division of income from the property and this will not necessarily terminate the joint tenancy. Wells v. Wells, 64 Cal.App. 2d 113, 148 P.2d 126; Tindall v. Yeats, 392 Ill. 502, 64 N.E.2d 903; see, 48 C.J. S., Joint Tenancy, § 11, p. 933; 33 C.J. 911."

It was the evident intent of the parties to the agreement to provide living quarters for defendant during his lifetime without affecting the title to the property in the event of the death of one of the joint tenants, thus giving to defendant a limited possessory interest in the property.

Defendant argues that there can be no recovery for breach of contract without an allegation of breach. However, the instant action is to quiet title to real property and the trial court having found on sufficient evidence that the joint tenancy was not destroyed by the agreement of April 23, 1951 and that the deed of July 9, 1951, was signed and delivered by Mary Nicolls as the result of undue influence exercised upon her by the defendant, the judgment is fully supported by the record.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.



121 Cal.App.2d 130

JONES v. KELLEY.

KELLEY v. JONES.

Civs. 19623, 19624.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1953.

Action by widow to quiet title to realty purchased with her separate estate and held jointly by her and her deceased hus-

band, consolidated with partition action by husband's grantee. The Superior Court, Los Angeles County, James H. Pope, J., entered judgment in favor of widow, and grantee appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained finding that deceased husband took joint title with widow on understanding that property would be held for their benefit, and for survivor of either of them, and that resulting trust arose in favor of widow upon husband's death.

Affirmed.

1. Husband and Wife ⇨14(1)

Form of instrument under which husband and wife hold title to realty is not conclusive as to status of realty.

2. Evidence ⇨390(4), 426, 461(4)

Property acquired under joint tenancy deed may be shown to be actually community property or separate property of one spouse, according to the intention, understanding, or agreement of parties.

3. Deeds ⇨94

Terms of deed are not controlling where parties enter into oral or written agreement as to ownership of property which conflicts with deed or where such oral understanding may be inferred from conduct and declarations of parties.

4. Trusts ⇨86

Presumption of resulting trust arises where title to property is taken in name of husband and consideration for transfer is furnished by wife.

5. Trusts ⇨86

Existence of resulting trust will be presumed to extent that gift was not intended, in favor of one who has paid entire purchase price for property which is conveyed to trust claimant and another as joint tenants, and other holds title to joint interest in trust for claimant.

6. Trusts ⇨86

Party asserting elements necessary to establish resulting trust has burden of proof.

7. Trusts ⇨89(1)

In action by widow to quiet title to realty purchased with her separate estate,

and held jointly by her and her now deceased husband, evidence sustained determination that title to property was taken jointly for benefit of both spouses, and that at husband's death, resultant trust arose in favor of widow, and that widow was sole owner of property.

Ball, Hunt & Hart, Long Beach, for appellant.

Elsie M. Farris and Mary Swift Beeks, Long Beach, for respondent.

DRAPEAU, Justice.

Mr. and Mrs. Jones were married October 22, 1938. He was then sixty-two years of age; she was sixty. It was a second marriage for each of them. He had one child by his prior marriage; she had two by hers. They lived together until Mr. Jones died of cancer August 6, 1950.

During the marriage Mrs. Jones sold some of her separate property and purchased a house in Long Beach. This house fitted her purposes: first, for a home for her and her husband, and, secondly, for an office for her business as a realty broker.

When the escrow instructions for this purchase were first drawn Mrs. Jones directed that the deed be made to her as her separate property.

Before the escrow closed she changed her instructions and directed that the property be conveyed to her and her husband as joint tenants. This was done.

Mrs. Jones testified on the trial in this case that she had the title so vested because she wanted to be sure her husband would have a home if she should die first, and because of her agreement with him that the property should go to the survivor of them, without regard to any of their children. In other words husband and wife agreed that neither of them would break the unity that exists in joint tenancy and that the property was to go to the one who survived the other.

This is clear from Mrs. Jones' testimony: "As near as I can remember, I said 'Well, Morris, I am paying for the property, but

I want it in joint tenancy,' so if anything happened to me, it would be his property, and if anything happened to him, it would be my property. We had that definite understanding."

Mr. Jones did not keep his agreement. About a week before he died his daughter, Edith Jones Kelley, stayed with him for part of a day, at the request of Mrs. Jones. While Mrs. Jones was away on business, Mr. Jones had his daughter make an appointment with an attorney. Then Mr. Jones and his daughter went to the attorney's office.

There Mr. Jones asked the attorney to prepare a will for him. In discussing the terms of his proposed will it developed that the only property Mr. Jones owned was his joint tenancy interest in the house referred to. So the attorney told him he didn't need to make a will; all he had to do was to convey his interest in the property by deed to a third person.

Then Mr. Jones asked his attorney to prepare such a deed, conveying his interest in joint tenancy in the property to his daughter. So a quitclaim deed was prepared, executed by Mr. Jones, and delivered to his daughter. The deed was then left in the attorney's office, to be sent to the Recorder's office.

It is hard to rationalize Mr. Jones' conduct. His wife had given him the best of care. She nursed and took care of him during his last illness. Before that he had been in an accident, in a cast, and laid up for a year or more. His wife took care of him and nursed him through that siege too. She was always devoted to him.

Perhaps as the sable messenger of death came closer and closer, Mr. Jones lost his power mentally to marshal all his duties and obligations, and could think of his daughter only. Perhaps it was with him as the trial judge quoted from Gray's *Elegy*: "On some fond breast the parting soul relies."

In any event, to her consternation and dismay, Mrs. Jones first learned of the deed after her husband had been buried.

Then followed an action to quiet title by Mrs. Jones, an action in partition by Mrs. Kelley, a trial upon the issues in the actions, which were consolidated for trial, with judgment in both cases for Mrs. Jones, from which judgments Mrs. Kelley appeals.

When the case was submitted for decision the trial judge stated his conclusions as follows:

"* * * the property was put in that position for the joint benefit of the parties. The trust didn't differ in any respect from the joint tenancy, except in this respect: That in joint tenancy I believe that it is within the power of a person to convey out their half, their undivided one-half interest, and yet that was not the intent, and that was not the agreement. It was the intent and it was the agreement that the property would be held for their benefit and for the survivor of them, and I am unable to escape that that is a trust.

"Therefore, the judgment in Jones v. Kelley will be that it is declared and adjudged that the defendant has no estate or interest whatsoever in the real property that is the subject of the action, and it is adjudged that the plaintiff is the owner of said premises and entitled to the possession thereof, and that the defendant is forever debarred and enjoined from asserting any claim whatsoever in the premises.

"As to the second one, the partition, the judgment is that the plaintiff take nothing."

Appellant argues that the trial court in making its finding that the husband held the property in trust was referring to a resulting trust; that the rule that when the purchase price is paid by another, a resulting trust follows does not apply when the person receiving title to property is the natural object of the bounty of the person paying for it; that when property is taken in the joint names of payor and one who is the natural object of the bounty of payor, payor must show by substantial evidence that a gift was not intended; and that taking the title in joint tenancy was an

indication of intention by the wife to make a beneficial gift to the husband.

The controlling question here is whether the wife intended to limit her gift represented by the deed in joint tenancy, and whether her husband agreed to take the deed subject to such limitation.

In *De Boer v. De Boer*, 111 Cal.App.2d 500, 504, 244 P.2d 953, it is held that an estate in real property may be found to be other than that indicated by the deed because of the intent with which the deed was made and received.

In *Socol v. King*, 36 Cal.2d 342, 223 P.2d 627, a judgment quieting title in the survivor of a joint tenancy was affirmed for the reason that there was no understanding between the parties that they held title other than as joint tenants. In that case the rules to be applied in the case at bar, together with the authorities in support thereof, are set forth:

[1,2] First. The form of the instrument under which a husband and wife hold title is not conclusive as to the status of the property. Property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse *according to the intention, understanding or agreement of the parties*. 36 Cal.2d at page 345, 223 P.2d at page 629.

[3] Second. When there is an oral or written agreement as to the ownership of the property, or where such an understanding may be inferred from the conduct and declarations of the spouses the terms of the deed are not controlling. 36 Cal.2d at page 346, 223 P.2d at page 629.

[4-6] Third. The presumption of a resulting trust arises where title to property is taken in the name of the husband and the consideration for the transfer is furnished by the wife. The existence of a resulting trust will be presumed, to the extent that a gift was not intended, in favor of one who has paid the entire purchase price of property which is conveyed to the trust claimant and another as joint tenants; that is the second party holds the title to a joint interest in trust for the claimant. But the bur-

den of proving the elements necessary to establish a resulting trust rests on the party asserting it. 36 Cal.2d at page 348, 223 P.2d at page 631.

[7] In the earlier case of *Huber v. Huber*, 27 Cal.2d 784, at page 790, 167 P.2d 708, at page 712, it is stated:

"In this state it is settled that because of the confidential relationship between husband and wife, an oral agreement between the spouses in connection with a conveyance of real property between them or by a third person to one of them can be enforced by making the grantee a constructive trustee for the other spouse if the grantee violates such an oral agreement."

The case of *Trimble v. Coffman*, 114 Cal. App.2d 618, 251 P.2d 81, upon which appellant relies, is not contrary to any of the rules above set forth. In that case it was held that the evidence was sufficient to sustain the trial court's findings that no agreement existed between a husband and wife who held property in joint tenancy upon which it was contended a resulting trust could be predicated. And in that case the District Court of Appeal approves the rules above stated and points out that whether there is or is not a resulting trust is primarily a question for the determination of the trial judge.

Tried by these rules it follows logically that the delivery of the deed in joint tenancy to Mr. Jones by Mrs. Jones, who paid the purchase price, is not conclusive evidence of the status of the title to the property, and that it was the province of the chancellor in equity to take into consideration all the facts and to declare whether or not there was a resulting trust. Examination of the record establishes that the testimony for Mrs. Jones amply sustains the burden upon her of proving the resulting trust by clear and convincing evidence.

The judgments are, and each of them is affirmed.

WHITE, P. J., and DORAN, J., concur.

121 Cal.App.2d 176

**NICHOLS v. BOARD OF RETIREMENT
OF ORANGE COUNTY et al.**

Civ. 4705.

District Court of Appeal, Fourth District,
California.

Nov. 6, 1953.

Action by special administrator against retirement board, wife of decedent, and others for determination as to who was entitled to certain death benefits. The Superior Court, Orange County, Robert Gardner, J., rendered judgment for wife and special administrator appealed. The District Court of Appeal, Griffin, J., held that where husband who was granted interlocutory divorce assigned wife in property settlement agreement specific personal property and wife assigned husband her title in certain described real and personal property and both agreed that earnings and property thereafter acquired should be separate property, wife had not waived rights to death benefits and was entitled to them in view of fact that husband had not revoked designation of wife as beneficiary as required by retirement law.

Judgment affirmed.

1. Counties ⚡69(3)

Generally, the provisions of the County Employee Retirement Law of 1937, providing for death benefits, are similar to a contract of life insurance and are to be governed by principles applicable to such contracts. Government Code, § 31450 et seq.

2. Counties ⚡69(3)

Insurable interest of employee's wife in his life which existed at time she was designated beneficiary of death benefits payable from the employees' retirement association continued up until employee's death, even though employee was granted an interlocutory divorce from his wife. Government Code, §§ 31450 et seq., 31780, 31782, Insurance Code, § 10110.

3. Husband and Wife ⚡279(4)

Where husband who was granted interlocutory decree of divorce assigned to his wife in property settlement agreement

his interest in specific personal property, wife assigned to husband her right in certain real and personal property and both agreed that earnings or other property thereafter acquired by either party should be separate property, wife had not waived any rights to death benefits payable from employee's retirement association and was entitled to such benefits in view of fact that husband had not revoked designation of wife as beneficiary. Government Code, §§ 31450 et seq., 31780, 31782, Insurance Code, § 10110.

4. Husband and Wife ⇐279(4)

General clauses or expressions in property settlement agreement are not to be construed as including an assignment or denunciation of expectancies and a beneficiary, therefore, retains his status if it does not clearly appear from the agreement that, in addition to the segregation of the property of spouses, it was intended to deprive either spouse of right to take property under an insurance contract of the other or by will.

Samuel Hurwitz, Orange, and Arthur M. Bradley, Santa Ana, for appellant.

Wm. P. Webb, Webb & Lae and Kaufman & Kaufman, Anaheim, for respondents.

GRIFFIN, Justice.

Clarence R. Nichols, as special administrator of the estate of Caryl R. Nichols, deceased, appeals from a judgment rendered in favor of defendant Ellen Jane Nichols. Both parties were claimants of \$2,677.95, being the benefits payable from the Orange County Employees' Association by reason of the death of Caryl R. Nichols. Most of the facts were stipulated to in the trial court. Defendant Ellen Jane Nichols and Caryl were married May 18, 1946. On May 1st, 1947, he became a member of the retirement association and remained such until his death on July 14, 1951. He executed and filed with the board a designation that his wife, Ellen Jane, be the beneficiary of any benefits to become due thereunder. On October 12, 1950, the parties executed a property settlement agreement

which made no specific mention of the benefits which had or might accrue under his rights of membership in the association, nor did it in any manner refer to or endeavor to change the name of the beneficiary thereunder. On October 25, 1950, Caryl was granted an interlocutory decree of divorce from Ellen Jane, and the property settlement agreement was made a part of it. On July 12, 1951, decedent attempted to make a will, leaving his entire estate to Ellen Jane, which will specifically included the death benefits accumulated, but it was denied probate for lack of attestation by witnesses. On July 14, 1951, he died. The property specially mentioned in the property settlement agreement had been divided between the parties and Caryl's estate was probated. Plaintiff, as special administrator, is now claiming, as against Ellen Jane, the Board of Retirement of Orange County, and other defendants, the proceeds of the death benefits due, under the theory that by the property settlement agreement Ellen Jane relinquished or forfeited her interest therein, as beneficiary, and therefore any accumulations thereunder were payable to Caryl's estate, citing such cases as *Cheney v. City and County of San Francisco Employees Retirement System*, 7 Cal.2d 565, 61 P.2d 754; and *Sullivan v. Union Oil Co. of California*, 16 Cal.2d 229, 105 P.2d 922.

It is plaintiff's claim that the trial court's finding that Ellen Jane Nichols, at no time, either by the terms of the property settlement agreement or otherwise, agreed to a waiver as beneficiary of any death or retirement benefits to be paid to her under its terms, that she was the owner of the whole of the benefits payable thereunder by reason of Caryl's death, and ordering the other defendants in control of it to pay it over to her, is not supported by the evidence.

The fund here involved is a death benefit payable under the County Employees Retirement Law of 1937, Sec. 31450, et seq., Government Code. Under its provisions, Sec. 31780, the retirement system is liable for a death benefit which shall be paid to his estate or to such person as he nominates by written designation duly

executed and filed with the board. It is agreed that no change in the name of Ellen Jane as the named beneficiary was ever made by deceased, and in the absence of any contrary provision of the property settlement agreement, the same would have been payable to her. The property settlement agreement is quite lengthy. The parties agreed that "Said parties are desirous of having a full and final adjustment and settlement of all their property rights and interests between them, and of no longer, or at all, having or *owing* any common, community, joint interest in any property of any kind, nature or description whatsoever"; that their community property would be divided between them in the manner set forth. The wife assigned to her husband as his sole and separate property all her right, title and interest in certain described real and personal property, and no mention is there made of the proceeds of the retirement fund involved. Then the husband assigned to his wife his interest in specific personal property. Then follows paragraph 7, in which it is provided that "the earnings and/or any property; real or personal, hereafter acquired by either party hereto shall be the separate property of the party so earning and/or acquiring the same; it is distinctly understood and agreed that all earnings of either party in the future, and all property of every kind and nature which either may acquire in the future by any manner or means, shall be and become the sole and separate property of the party so acquiring the same. Neither party hereto shall hereafter claim, or assert, that any property standing in the name of the other party, or under his or her control, is community property, and from the date hereof, except as otherwise herein provided, all property standing in the name of either of the parties hereto or under his or her control, shall be deemed and considered to be the sole and separate property of the party in whose name it stands and under whose control it is; * * * that they will each execute and deliver any and all written instruments reasonably necessary and proper to carry into effect the stipulations and agreements herein contained. * * *

It is paragraph 7, when construed in connection with the other paragraphs mentioned, that convinces plaintiff that Ellen Jane waived any rights to the proceeds of the fund mentioned. We do not so construe that paragraph. The whole question involved is whether she waived her rights as beneficiary even though it may be questioned whether she may have waived any community property rights she may have had in and to the proceeds of the fund.

In *Grimm v. Grimm*, 26 Cal.2d 173, 175, 157 P.2d 841, it was held that a wife can release her community interest in an insurance policy and still be a beneficiary thereof. That case pointed out, however, that a wife would not be entitled to such proceeds if the parties agreed that no rights were to accrue to her, even though she remained the beneficiary at the time of the husband's death; that the question remains whether the spouses agreed not only that the policy should become the separate property of the husband but that no rights should accrue to plaintiff even though she remained the beneficiary at the time of the husband's death.

In *Cheney v. City and County of San Francisco Employees Retirement System*, supra, relied upon by appellant, the written contract of the spouses determined the character of the fund there involved to be the separate property of the decedent. Nevertheless, it was held that the nominated beneficiary, the mother, was entitled to the funds.

In *Shaw v. Board of Administration*, 109 Cal.App.2d 770, 241 P.2d 635, it was likewise held that if the wife effects a release of her community property interest and the husband revokes his designation of her as a beneficiary, she has no right to the insurance proceeds on his death, but that if he fails to revoke his designation of her as beneficiary, as he did in the instant case, she is entitled, like any other beneficiary, to the proceeds of the property on his death. It was there held that the petitioner then takes the death benefit not by reason of any community interest she may have had in the amount paid to the system prior to the divorce decree, but by virtue of being the named beneficiary.

[1] Generally speaking, the provisions of the act providing for death benefits are similar to a contract of life insurance, to be governed by principles applicable to such contracts. *Shaw v. Board of Administration*, *supra*, and cases there cited.

[2] In the instant case Ellen Jane, as the wife of decedent employee, had an insurable interest in his life at the time she was designated and up until his death. *Ins.Code*, Sec. 10110; *Jenkins v. Jenkins*, 112 Cal.App. 402, 297 P. 56; *Sullivan v. Union Oil Company of California*, *supra*, 16 Cal.2d at page 237, 105 P.2d at pages 926, 927. It should be here particularly noted that the nomination of a beneficiary and the revocation thereof are expressly governed by the Retirement Law of 1937, Secs. 31780 and 31782, Government Code. No revocation, as required by the act, was filed by Caryl.

In *Shaw v. Board of Administration*, *supra*, similar sections of the State Employees' Retirement Law, Sec. 20000 et seq., Government Code, were under consideration. There it was held that the unrevoked designation of a beneficiary, provided such person had an insurable interest, required payment to the named beneficiary. In the *Sullivan* case, relied upon by plaintiff, there were no such statutory regulations governing the designation or revocation of a beneficiary. It should also be noted that in that case the property in question was being considered by the parties, and all the pertinent facts were in their minds. The respective rights and the desired disposition of the fund were couched in more specific terms, and there the wife expressly released her interest in the fund.

[3,4] We conclude that the court, in the instant action, was justified in interpreting the property settlement agreement in accordance with its terms and the intent of the parties, as indicated and as found by it. It is the rule that general expressions or clauses in such agreements are not to be construed as including an assignment or denunciation of expectancies and that a beneficiary therefore retains his status under the instrument in question

if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under an insurance contract of the other or by will; that a contract constitutes an equitable assignment or renunciation to expectancy only if it expressly or by necessary implication so provides. *Grimm v. Grimm*, *supra*.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.



121 Cal.App.2d 301

PEOPLE v. HART et al.

Cr. No. 5038.

District Court of Appeal, Second District.
Division 3, California.

Nov. 16, 1953.

Defendant was convicted of unlawfully possessing marijuana. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., rendered judgment on the verdict, and defendant appealed. The District Court of Appeal, Vallée, J., held that defendant was not denied a fair trial and the right to be confronted with the witnesses against him because he did not personally join in his counsel's stipulation with the district attorney in defendant's presence for submission of the cause on the transcript of the evidence taken at the preliminary examination and waiver of defendant's right to be confronted by and further cross-examine the witnesses who testified against him thereat.

Judgment affirmed.

I. Criminal Law ⇨662(8)

One convicted of unlawfully possessing marijuana was not denied fair trial and right to be confronted with witnesses against him because he did not personally

join in his counsel's stipulation with district attorney in defendant's presence for submission of cause on transcript of evidence taken at preliminary examination and defendant's waiver of right to be confronted by and further cross-examine witnesses who testified against him thereat. Pen.Code, § 686; Health and Safety Code, § 11500.

2. Criminal Law ☞662(8)

An accused's statutory right to be confronted with witnesses against him may be waived and trial had on transcript of evidence taken at preliminary examination by stipulation of defendant's counsel in defendant's presence without defendant personally joining therein. Pen.Code, § 686.

3. Attorney and Client ☞86

Accused's counsel has right to stipulate relative to any steps of action or proceeding, particularly where stipulation is made in presence of accused, who makes no objection thereto.

Walter L. Gordon, Jr., Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

[1] Defendant, Savage, appeals from a judgment of conviction of unlawfully having marijuana in his possession in violation of section 11500 of the Health and Safety Code. The district attorney and defendant's counsel, in the presence of defendant, stipulated that the cause be submitted on the transcript of the evidence taken at the preliminary examination and that the defendant waived the right to be confronted by the witnesses who testified at the preliminary examination and to further cross-examine them. Defendant did not personally join in the stipulation.

Defendant's only contention is that he was denied a fair trial and the right to be confronted with the witnesses against him because he did not personally join in the stipulation. The contention is without merit.

[2,3] The Constitution of California does not contain a provision that in a criminal prosecution the accused shall have the right to be confronted with the witnesses against him. See Const.Cal. art. I, sec. 13. Penal Code section 686 provides that "In a criminal action the defendant is entitled: * * * to be confronted with the witnesses against him, * * *." It is uniformly held in this state that this right may be waived, and a trial had on the transcript of the evidence taken at the preliminary examination on stipulation made by the defendant's counsel when made in the defendant's presence without the defendant personally joining in the stipulation. In *People v. Dessauer*, 38 Cal.2d 547, 241 P.2d 238, certiorari denied *Des-sauer v. People*, 334 U.S. 858, 73 S.Ct. 96, 97 L.Ed. 666, the court stated, 38 Cal.2d at page 552, 241 P.2d at page 241: "The right to be confronted by witnesses, whether assured by Constitution or statute, may be waived, and a trial may be had on the transcript of the evidence taken at the preliminary hearing on stipulation by defendant and his counsel, *People v. Wallin*, 34 Cal.2d 777, 215 P.2d 1, or by the latter's stipulation, at least when made in defendant's presence. *People v. Romero*, 100 Cal.App.2d 352, 223 P.2d 511; *People v. Young*, 100 Cal.App.2d 488, 224 P.2d 46." In *People v. Cohen*, 94 Cal.App.2d 451, at page 457, 210 P.2d 911, at page 915, it is said: "It appears to be well-established law that counsel has the right to stipulate relative to any of the steps of an action or proceeding, particularly where the stipulation was made in the presence of the accused who made no objection to it. *People v. Graves*, 84 Cal.App.2d 531, 535, 191 P.2d 32; *People v. Hanna*, 36 Cal.App.2d 333, 336, 97 P.2d 847. Moreover, it has been held that the right to be confronted by the witnesses against him is a personal privilege which may be waived by the accused, and such a waiver is accomplished when counsel for defendant stipulates that the evidence taken at the preliminary examination may be considered by the court as evidence at the trial. *People v. Tanner*, 77 Cal.App.2d 181, 188, 175 P.2d 26."

See, also, *People v. Donnelly*, 95 Cal.App.2d 595, 597-598, 213 P.2d 502.

Affirmed.

SHINN, P. J., and PARKER WOOD, J.,
concur.



ELLSWORTH v. ELLSWORTH.*

Civ. 19871.

District Court of Appeal, Second District,
Division 1, California.

Nov. 10, 1953.

Hearing Granted Jan. 6, 1954.

Proceeding on wife's motion to modify divorce decree which awarded custody of minor child to husband. The Superior Court, Los Angeles County, Daniel N. Stevens, J., entered an order modifying the decree so as to award custody to the wife, and on husband's motion, entered an order setting aside the previous order, and the wife appealed. On husband's motion to dismiss the appeal, the District Court of Appeal, Drapeau, J., held that the second order was appealable.

Motion denied.

Doran, J., dissented.

Divorce ⇨ 312.1

Order setting aside previous order which modified divorce judgment, which had originally awarded custody of minor child to husband, by giving custody of child to wife was appealable. Code Civ.Proc. § 963.

John C. Campbell and W. Floyd Cobb,
Los Angeles, for appellant.

John U. Edwards, Glendale, for respondent.

DRAPEAU, Justice.

The parties to this action were divorced in 1952. Final and interlocutory decree

* Subsequent opinion 269 P.2d 3.

awarded custody of their minor child to plaintiff husband. Defendant wife defaulted and did not appear.

Thereafter the wife filed notice of motion to modify the decree as to custody. It was stipulated that the matter be referred to a court investigator, and that his report might be considered as evidence on the hearing of the wife's motion.

The investigator reported that the boy was two and a half years of age; that neither plaintiff nor defendant had remarried; that the father had been keeping the boy in a boarding home, but had recently employed a housekeeper and was taking care of the boy in his own home; that the mother was employed and lived with friends who would take care of the boy while the mother was at work. The investigator recommended that the boy be placed in the custody of the mother.

The matter was then referred to a court commissioner. The commissioner heard a number of witnesses, made findings of fact that the father had given the boy good care, that both parents were fit and proper persons to have custody; that, however, the best interests of the boy would be served by placing him with the mother. The commissioner recommended accordingly.

At the end of the commissioner's report appears the following notation by the judge of the Superior Court: "So ordered."

The husband filed objections and exceptions to the report of the commissioner and the order of the court, and moved to set the order aside.

This motion was argued and submitted; whereupon the court made a minute order in part as follows:

"Plaintiff's exceptions to the findings and report of the commissioner are sustained, and his motion to set aside the order based upon said findings and report is granted leaving the order for custody in effect as set forth in the interlocutory decree and as incorporated by reference in the final decree. Re Hearing is set for April 1—1953 at 9:45 a.m. The reporter's transcript is ordered filed. Memorandum opinion in re ruling is filed."

Defendant appeals from this order.

Plaintiff moves to dismiss the appeal upon the ground that it was taken from a non-appellable order.

Section 963 of the Code of Civil Procedure provides that an appeal may be taken from any special order made after final judgment. The order under consideration determines custody of a ward of the court after final judgment of divorce, and falls within that category. *Harron v. Harron*, 123 Cal. 508, 56 P. 334; *Crowley v. Superior Court*, 17 Cal.App.2d 52, 61 P.2d 372; *Sjoberg v. Hastorf*, 33 Cal.2d 116, 199 P.2d 668; 3 Cal.Jur.2d 469.

The motion to dismiss the appeal is denied.

WHITE, P. J., concurs.

DORAN, Justice (dissenting).
I dissent.

The order which modified the judgment by giving the child to the wife, in the circumstances and in the light of the record, was appealable. The second order setting the first order aside, in my opinion, is not appealable.



121 Cal.App.2d 144

PEOPLE v. GOMEZ.

Cr. 5073.

District Court of Appeal, Second District,
Division 1, California.

Nov. 5, 1953.

Defendant was convicted of possessing heroin. The Superior Court of Los Angeles County, Thomas L. Ambrose, J., entered judgment and denied new trial, and defendant appealed. The District Court of Appeal, Drapeau, J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

Polsons 9

Evidence was sufficient to sustain conviction for possession of heroin.

J. Widoff, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Dep. Atty. Gen., for respondent.

DRAPEAU, Justice.

Defendant was tried by the court for possession of heroin.

The arresting officer testified that he had been watching defendant through the glass panel of a door. Defendant was seated in the room under observation, talking with two women. Then, as defendant started toward the door, the officer opened it. The door struck defendant and knocked a package out of his hand and onto the floor.

The officers picked up the package. It contained five smaller packages or bindles of heroin, wrapped in cellophane.

Defendant testified that the heroin did not belong to him; that it belonged to one of the ladies in the room.

Defendant was convicted. His application for probation was denied, and he was sentenced to the county road camp for a six-months term. He appeals from the judgment and from an order denying his motion for a new trial.

In his brief defendant states: "It is the contention of the defendant that the evidence adduced at the trial was so unsubstantial and improbable as to amount to no evidence at all."

This contention is without merit. *People v. Silva*, 119 Cal.App.2d 421, 259 P.2d 74, and cases there cited. Even defendant's brief quotes testimony of the arresting officer which supports the decision of the trial judge:

"Q. Did you see this drop from his hand? A. Yes. I did."

The judgment and the order denying defendant's motion for a new trial are, and each of them is, affirmed.

WHITE, P. J., and DORAN, J., concur.

121 Cal.App.2d 194

HALL et ux. v. BURROWS.

Civ. 8215.

District Court of Appeal, Third District,
California.

Nov. 9, 1953.

Proceeding for injunction restraining defendant from use of plaintiff's land for purpose of draining defendant's adjacent land. The Superior Court, Sutter County, Arthur Coats, J., entered judgment for plaintiff, denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Peek, J., held that neither project of reclamation district nor agreement between previous owners of the adjacent plots gave defendant right to use drainage facilities on plaintiff's land.

Judgment and order reversed.

1. Waters and Water Courses ⇨126(2)

In suit for injunction restraining defendant from use of plaintiff's land for purpose of draining defendant's adjacent land, evidence failed to establish that agreement entered into by previous owners of adjacent plots providing for jointly owned irrigation system, extended any pre-existing drainage system or contemplated that irrigation system would be used for drainage of artificial water. Civ. Code, § 1104.

2. Waters and Water Courses ⇨150

Where reclamation district connected a drainage ditch on plaintiff's land with borrow pit of irrigation system jointly owned by plaintiff and defendant, but the use was permissive, such use did not justify defendant's entrance on plaintiff's land to make adverse use of the borrow pit for drainage of defendant's land.

3. Waters and Water Courses ⇨154(2)

Where agreement, entered into by previous owners of adjacent plots, providing for a jointly owned irrigation system, was expressly limited to the creation of an irrigation system, no implied easement for drainage was created.

4. Waters and Water Courses ⇨154(2)

Where defendant's grantor entered into agreement with plaintiff's grantor for the creation of jointly owned irrigation sys-

tem to serve their adjacent plots and defendant's grantor conveyed to plaintiff's grantor a strip of land extending across his property, an easement of drainage in favor of defendant's grantor in the use of such strip of land would have to arise by reservation.

5. Waters and Water Courses ⇨124

Where defendant entered onto plaintiff's land to connect drainage ditch on plaintiff's land with borrow pit of jointly owned irrigation system, for purpose of draining defendant's land, plaintiff was entitled to injunction restraining defendant from such acts, although defendant was making reasonable use of existing facilities.

Weis & Weis, Yuba City, for appellants.

Manwell & Manwell, Marysville for respondent.

PEEK, Justice.

The present controversy arose out of defendant's forceful use of a portion of plaintiffs' land for the purpose of draining defendant's land. At the conclusion of the trial the court found in favor of defendant and it is from the judgment entered pursuant thereto and from the order denying the motion for a new trial that plaintiffs have now appealed.

Plaintiffs and defendant are adjoining land owners, having acquired their properties in 1945. In 1930 their predecessors in interest executed an agreement for the construction and maintenance of a jointly owned irrigation system. As a part of the plan defendant's predecessors conveyed in fee to plaintiffs' predecessors a forty-foot strip beginning at the Sacramento River on the west and extending easterly across the southerly end of defendant's land, and continuing for a short distance on to plaintiffs' property. On this strip an irrigation canal with parallel borrow pits was constructed. At that time the upper portion of defendant's land was rough, had never been irrigated and contained a pond-like depression. In 1942 Reclamation District 70 built a drainage ditch extending from

the pond easterly across the property line and thence running southerly through plaintiffs' land, eventually emptying into a drainage ditch likewise constructed by the District. There was no grant of right of way for this ditch and apparently it had never carried any water. In 1945 defendant leveled his land, filling in the pond and the drain which led to plaintiffs' land. Thereafter plaintiffs likewise filled that portion of the drain on their property. The defendant, in leveling his land, graded it to the southeast corner of his property. At the outset of defendant's farming of his property no irrigated crops were grown. However, since 1947 he has grown irrigated crops on his land, draining the excess runoff from such irrigation into the said borrow pit.

On plaintiffs' land at a point approximately fifty feet south of said borrow pit there is a drainage ditch built by said Reclamation District. The borrow pit is connected to such ditch by means of a 24 foot pipe which was purchased and paid for by plaintiffs but was installed by the District. In 1947 the defendant admittedly came upon plaintiffs' land without permission, and excavated a drainage canal or ditch approximately two feet deep and three and one-half feet wide along the course of the old borrow pit from the southwest corner of the plaintiffs' property to the drain pipe.

Thereafter plaintiffs' action was instituted alleging that defendant, unless restrained, would continue to trespass upon plaintiffs' land and occupy the same for drainage purposes. It was also alleged that plaintiffs had suffered certain damages. Their prayer requested that defendant be restrained and enjoined from so using plaintiffs' land. The question of damages, however, has since been waived.

The court found that defendant was not upon plaintiffs' land wrongfully but merely made "a slight alteration in the drainage program affecting property of plaintiffs and defendant in conjunction with the design for drainage and irrigation of land furnished by Reclamation District 70 * * * and defendant did not damage plaintiffs' lands or any rights of plaintiffs thereby." The court further found that at

the time the 1930 agreement was executed it was "contemplated by the predecessors in interest of the parties herein that both of said parties could irrigate their lands and drain the same in ditches, canals and drains heretofore used for that purpose."

It is appellants' main contention that regardless of whether or not any damages resulted to them, the acts committed by defendant could, by usage, ripen into an easement, and therefore they are entitled to the injunction as prayed.

[1,2] The evidence shows without contradiction that at the inception of this proceeding defendant had no right of way either by grant or by usage across plaintiffs' land. The record is likewise barren of any evidence to indicate that there was a pre-existing drainage system for artificial water which was continued under the agreement, Civ. Code, § 1104, or that it was contemplated that such a use was to be made of the irrigation system. The District's use of the borrow pit on plaintiffs' land does not help defendant. Such use was shown to have been only permissive. The defendant's use, however, is conclusively shown to have been adverse.

[3,4] The scope of the 1930 agreement was expressly limited to the creation of an irrigation system. It created no implied easement for drainage. See *Fischer v. Hendler*, 49 Cal.App.2d 319, 121 P.2d 792. In fact it specifically provided that the grantors (defendant's predecessors in interest) waived "any rights they may have to complain or to recover damages by reason, at any time, of seepage water from said ditch," a condition entirely repugnant to defendant's present contention. Furthermore, it should be noted that it is the defendant, the successor of the grantor in the 1930 agreement, who is claiming the implied easement. Under the circumstances herein the easement, if any, of necessity, would have to arise by reservation rather than by grant. However, since there is nothing in existence at the time of the grant, no easement could have so arisen. As previously mentioned the adverse user by defendant was not of sufficient duration, and he makes no contention in that regard.

[5] It may be true, as the trial judge concluded, that the acts of defendant in tying on to the existing facilities on plaintiffs' property made a reasonable use of such existing facilities; nevertheless those facilities do not belong to respondent and he simply had no right to use them.

The judgment and order are reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.



121 Cal.App.2d 298

PEOPLE v. HENDERSON.

Cr. 5051.

District Court of Appeal, Second District,
Division 2, California.

Nov. 16, 1953.

Hearing Denied Dec. 10, 1953.

Prosecution for taking and driving automobile without consent of owner, with intent to deprive owner of title and possession. Defendant pleaded guilty, the Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment against him, and defendant appealed. The District Court of Appeal, Moore, P. J., held that in absence of proof to the contrary, it must be presumed that the prosecutor fulfilled his functions properly and that defendant's arraignment was properly conducted.

Judgment affirmed.

1. Criminal Law ⇨264

Where court and prosecuting attorney stated to defendant that he was charged with felony, and where defendant received copy of information disclosing crime he was charged with to be a felony, and had counsel, arraignment was in complete compliance with statute prescribing manner of arraignment. Pen.Code, § 988.

2. Criminal Law ⇨322

In prosecution for taking and driving automobile without consent of owner with intent to deprive owner of title and possession, prosecutor was presumed to have

fulfilled his duties properly, in absence of proof to contrary, and was presumed to have given defendant a copy of information revealing that defendant was charged with a felony. Code Civ.Proc. § 1963, subd. 15.

3. Criminal Law ⇨273

In prosecution for taking and driving automobile without consent of owner with intent to deprive owner of title and possession, where defendant had counsel and where defendant's plea of guilty was properly obtained, the plea admitted every element entering into offense charged.

4. Criminal Law ⇨1128(2)

In absence of record, by affidavit or otherwise, Court of Appeal could not notice agreement between prosecutor and defense attorney to mitigate charge and sentence against defendant charged with felony.

Edmund G. Brown, Atty. Gen., Alan R. Woodard, Deputy Atty. Gen., for respondent.

Robert W. Henderson, in pro. per.

MOORE, Presiding Justice.

Having pleaded guilty to the charge of taking and driving an automobile of a Los Angeles corporate merchant without its consent, with intent to deprive the owner of its title to and possession of the vehicle, Vehicle Code, sec. 503, appellant has appealed from the judgment. The six assignments of error may be summed up in two, to wit: (1) appellant thought he was pleading guilty to a misdemeanor; (2) the evidence against him was false, fraudulent and perjured. The record seems to contradict such claims.

At the arraignment, the court stated to appellant that he was charged¹ by the pleading "with the crime of a violation of section 503 of the Vehicle Code * * * a felony, which involves the operation of a motor vehicle without the consent of the owner. Heretofore, you have pleaded not guilty to this charge, and I am advised by your counsel * * * that you desire to

1. The information contained a first count accusing the defendant of theft. It was dismissed.

plead guilty; is that true?" After he had answered "Yes," the court inquired whether appellant was acting on his own free will, whether anybody had promised him any advantage for pleading guilty, and whether he understood that "any penalty to be imposed rests entirely with the judge?" Appellant replied in the affirmative. Thereupon, the prosecuting attorney repeated the number of the section of the Vehicle Code, the violation thereof, "a felony. At this time how do you plead, guilty or not guilty?" To that question appellant answered, "guilty."

[1,2] From such proceedings it is clear that the arraignment was in complete compliance with the statute, Penal Code, sec. 988, which prescribes the manner of an arraignment, including the delivery of a true copy of the accusatory pleading. Inasmuch as the "official duty" of the prosecutor is presumed to have been "regularly performed", Code Civ.Proc. sec. 1963, subsec. 15, and no proof having been made that would dispel such presumption, appellant cannot avoid the resulting conclusion that appellant received a copy of the information which disclosed that the crime to which he pleaded guilty was a felony.

[3] By virtue of the facts that (1) appellant had the advice of counsel at all stages of the proceeding, and (2) the plea was impliedly admitted to have been properly obtained, he thereby admitted every element entering into the offense charged. *People v. Mendieta*, 101 Cal.App.2d 788, 789, 226 P.2d 34; *People v. Outcault*, 90 Cal.App.2d 25, 29, 202 P.2d 602. He knew he was charged with having committed a felony; the court told him; the prosecutor told him; he pleaded guilty in open court with his attorney at his side. In contending that the evidence against him was false, fraudulent, and perjured, appellant "did not reckon with his host." Not a word of testimony was received. The plea of *guilty* disposed of every issue previously raised by his originally pleading not guilty.

[4] In his closing brief in *propria persona*, appellant says that his attorney and the district attorney represented to the court that the evidence would not warrant a conviction for a felony and that if appellant was willing such prosecutor would file an amended information charging a misdemeanor; also, that appellant would receive no jail sentence. He now contends that such statements of the district attorney and his own counsel were not made to the court at any time. By reasons of such fraudulent acts of the two lawyers, appellant contends that he was cheated of his liberty and of the privilege of contesting the new count in the information that accused him.

There is nothing a reviewing court can do about talk outside of a court proceeding in the absence of an appropriate record thereof by affidavit or otherwise. If we were obliged on every appeal to try the merits of conversations participated in by litigants outside the presence of the court there would be no end of most appeals. Our only concern is with what was said to the court or in its presence when actually investigating the facts of a controversy or with what is said by an accused person in making his plea of guilty or by his own or the opposing counsel and the remarks of the court, if any.

By reason of the brevity of the proceeding under review there is nothing to be reviewed. But because it is brief, appellant is not thereby licensed to create a record of conversations that might have occurred, somewhere. Merely because a prisoner fills his brief with narratives about which the court below knew nothing, a record on appeal is not thereby made. Briefs are not the basis of an appeal. They discuss the record contained in the reporter's transcript and in the minutes of the clerk.

The judgment is affirmed.

McCOMB and FOX, JJ., concur.

121 Cal.App.2d 84

DYER v. WATSON, Real Estate Com'r et al.
Civ. 19451.

District Court of Appeal, Second District,
Division 3, California.
Nov. 4, 1953.

As Modified Nov. 9, 1953.

Real estate broker, whose license had been revoked by the State Real Estate Commission, brought mandamus proceedings against the commissioner to compel him to vacate his order of revocation. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered judgment denying writ, and broker appealed. The District Court of Appeal, Parker Wood, J., held that evidence sustained commissioner's finding that broker falsely represented to those who had registered with broker that real properties were available for rental purposes without broker actually having knowledge thereof and that revocation of license was therefore justified.

Judgment affirmed.

1. Brokers ⇨4

Licensed real estate broker, who represented to the public at large that she possessed hundreds of bona fide listings of vacant properties at stated rental rates and that on payment of registration fee she would furnish addresses of listings of realty then available for rental for stated price, was subject, as a real estate broker, to jurisdiction of the State Real Estate Commissioner with respect to transactions with those who registered with her. Business and Professions Code, § 10131.

2. Administrative Law and Procedure ⇨327
Brokers ⇨3
Evidence ⇨116, 317(4)

In proceeding before State Real Estate Commissioner for revocation of license of broker on ground that she obtained fees from registrants by false representations in newspaper advertisements concerning rental properties, testimony of registrants that at some of the places where registrants were directed to go by broker the owners told registrants that the places had been rented or that broker had been notified of such renting or that such places were not

for rent or had not been listed with broker was hearsay, but was properly admitted to explain direct evidence that registrants were unable to rent places. Government Code, § 11513; Business and Professions Code, §§ 10176(a-c, i), 10177(c, f).

3. Administrative Law and Procedure ⇨327
Constitutional Law ⇨318
Licenses ⇨38

In an administrative proceeding for revocation of license, hearsay evidence alone is insufficient to satisfy requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence.

4. Brokers ⇨3

In proceeding before State Real Estate Commissioner for revocation of license of real estate broker on ground that she obtained fees from registrants by false representations in newspaper advertisements concerning rental properties, evidence sustained findings of commissioner that broker violated her duty as agent by falsely representing to registrants that real properties were available for rental purposes without actually having knowledge thereof. Business and Professions Code, §§ 10176(a-c, i), 10177(c, f).

5. Statutes ⇨47

Provisions of Business and Professions Code that State Real Estate Commissioner may revoke a real estate license where licensee has been guilty of a continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen or is guilty of any other conduct which constitutes fraud or dishonest dealing are not unconstitutional on ground that they are uncertain. Business and Professions Code, § 10176(c, i); Const. art. 4, § 24.

Hal Hughes, Los Angeles, for appellant.
Edmund G. Brown, Atty. Gen., and Lee B. Stanton, Deputy Atty. Gen., for respondents.

PARKER WOOD, Justice.

The real estate commissioner revoked the license of Cornelia Rita Dyer, a licensed

real estate broker. She petitioned the superior court for a writ of mandate compelling the commissioner to vacate his order of revocation. The petition was denied and she appeals from the judgment.

In an accusation, filed by a deputy commissioner, it was charged that between June 1, 1950 and October 5, 1950, Cornelia Rita Dyer (hereinafter referred to as licensee), either personally or through her representatives, obtained \$5 from each of 20 designated persons by falsely representing to them that she possessed hundreds of bona fide listings of vacant rental properties at stated rental rates in particular areas; that in each instance she should have known that the properties she referred said persons to were not for rent, or were not as represented, and therefore each sum of \$5 was obtained under false pretenses. It was charged further therein that during the month of March, 1951, she as a licensed real estate broker, caused to be published classified advertisements in the Los Angeles Examiner containing substantially the following wording: "\$1 a day and up restricted—unrestricted \$5 fee renters see Cornelia Dyer L. A.'s oldest, largest most personal rental service for best rentals available at lowest cost furnished houses and apartments"; said advertisements contained itemized lists of "approximately 30 to 50" purported vacancies at rental rates of \$30 to \$50 monthly furnished, and also represented that she was in possession of over 900 others, furnished and unfurnished; said advertisements were false and misleading and were known by licensee to be false and misleading at the time she caused them to be published. It was also stated therein that by reason of the alleged facts the licensee acted in violation of section 10176, subdivisions (a), (b) and (i), and section 10177, subdivision (c) and (f) of the Business and Professions Code.

In a supplemental accusation it was charged that, between June 3, 1950 and July 5, 1951, the licensee obtained \$5 under false pretenses from each of 12 persons; and that licensee's advertisements in newspapers were false and misleading. In a second supplemental accusation she was charged with 13 additional similar violations, in-

cluding a charge that she violated subdivision (c) of section 10176.

After a hearing the real estate commissioner found that from June, 1950 to July, 1951 (inclusive), the licensee represented to the public at large and to 16 persons (specifically designated therein) that she possessed hundreds of bona fide listings of vacant properties at stated rental rates in particular areas, and upon the payment of a registration fee she would furnish addresses of listings of real property which were then actually available for rental for the stated price, and if the addresses were not suitable the registrant could by telephone contact licensee's office and secure additional addresses without payment of additional fees; that in truth neither licensee nor her representatives knew whether or not said listings were actually available for rental; licensee intentionally concealed from said registrants the fact that she had no actual knowledge of the availability of said listings, and she further concealed from said registrants that licensee's telephone facilities were inadequate and long delays would be encountered in seeking to reach her office by telephone, and that they would be informed that no further listings were available; in reliance upon the representations of licensee and without knowledge of the falsity thereof 16 persons (designated therein) registered with and paid to licensee the registration fee required and received addresses of listings as being available for immediate rental and when said persons called at said addresses, they were advised that said places were not available for rental and in several instances said places had not been listed with licensee; prior to the time licensee would furnish any addresses of real property represented as being available for rental purposes, licensee would enter into a written agreement with each registrant, which agreement provided in part that the service which licensee offered consisted "of referring Registrants to Landlords who have listed their vacancies with her for rent," that no guarantee is made "as to the price of rental, location or acceptance of Registrant" by landlord, nor is registrant "obliged to accept any rental not to his liking"; said provision of the

written agreement was in direct conflict with the oral representations of licensee that rentals were available in particular areas at specified rents, and licensee falsely concealed said conflict from the persons contacting her; licensee's acceptance of compensation from various persons for her services in the procurement of real property for rental purposes created the relationship of principal and agent within the purview of section 10131 of the Business and Professions Code, and she had a duty to make a full and fair disclosure of all the facts as to the actual availability of the real property for rental purposes; in violation of her duty as an agent she did falsely represent to her principals that the real properties were available for rental purposes without actually having knowledge thereof and that said false representations were made for the purpose of inducing others to enter into the principal-agency relationship with her.

The commissioner made the following determination of issues: Licensee has been guilty of violations of section 10176 of the Business and Professions Code as follows: making false promises of a character likely to influence, persuade or induce [violation of subdivision (b)]; a continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen [violation of subdivision (c)]; conduct which constitutes fraud or dishonest dealing [violation of subdivision (i)].

Licensee alleged, among other things, in her petition for a writ of mandate that the commissioner acted without jurisdiction in revoking her license; the evidence before the hearing officer was insufficient to show that licensee violated any of said sections of the Business and Professions Code, and such evidence does not support the findings of the hearing officer or the order of revocation.

The matter was submitted upon the record of the proceedings before the commissioner. The trial court found that the commissioner did not proceed without or in excess of his jurisdiction; the findings of the commissioner are supported by the weight

of the evidence; and the findings support the order of the commissioner.

[1] Appellant (licensee) contends that the commissioner did not have jurisdiction, because appellant was not required to have a real estate broker's license to engage in the business of such rental agent. Section 10131 of the Business and Professions Code provides: "A real estate broker * * * is a person who, for a compensation, * * * negotiates the purchase or sale or exchange of real estate, or who, for compensation, * * * rents, or places for rent, or collects rent from real estate, or improvements thereon, for another or others." Appellant argues that she did not, for compensation or otherwise, rent or place for rent real estate or improvements thereon; that she did not for compensation, from the landlord, rent anything or place anything for rent; that she did not rent anything, in that, she merely sold to registrants a list of names and addresses and let them seek their future landlord from such list; that she merely sold information that was selective and fitted to the price bracket and other requirements of the customer. Appellant states in her brief, in summarizing the evidence with respect to the various transactions involved, that "in each case a customer approached your Appellant or some of her employees at her place of business, signed a contract, the effect of which is that the customer sought and paid for, and your Appellant received payment and agreed to furnish, certain information respecting rental vacancies for residential purposes." Appellant was a real estate broker and, among her employees, in her place of business there were two real estate brokers and two real estate saleswomen. In 15 of the 16 violations found by the commissioner, the prospective renters had seen appellant's rental advertisements in newspapers prior to going to her place of business. Many of the advertisements, received in evidence as exhibits, included a brief description of the rental property, a statement of the amount to be paid as rent, and the words: "Lic. Real Estate Broker Cornelia Dyer Lowest Fee Best Rentals." Said renters told appellant, in effect, that

they wanted to rent apartments or houses under certain terms and conditions. Each renter paid \$5 to appellant, and appellant issued a receipt for said sum. The receipts stated, in part, that the sum was received for a certain number of days of rental service, and that the service which appellant offered "consists of referring Registrants to Landlords who have listed their vacancies with her for rent." At the top of the receipt there were words as follows: "Cornelia Dyer Real Estate Broker Real Estate Rentals Leases." The evidence shows that appellant, for compensation, placed real estate of others for rent. In the 16 transactions here involved the appellant was subject, as a real estate broker, to the jurisdiction of the real estate commissioner. In the case of *People v. Booth and Edwards*, decided by the appellate department of the superior court of Los Angeles County in 1952 (but not reported), defendant Edwards was charged with a misdemeanor in that she acted as a real estate salesman without a license. Booth, a licensed real estate broker, owned a business known as "City Rental Agency," and Edwards, who was not a licensed real estate salesman, was employed by him as a salesman. Lists of apartments for rent were maintained at the place of business. Edwards frequently received information from landlords about apartments for rent. The manner of conducting the business was to give a patron a list of places supposed to fit his needs, charge him a fee, and let him go to the places listed and negotiate for the rental thereof. Edwards, the unlicensed salesman, conducted such a transaction with a patron. Edwards was convicted, and she contended on appeal therein that her acts did not bring her within the definition of a real estate salesman; that she merely informed prospective renters about places for rent, leaving the matter thereafter to the renters and landlords. The court therein affirmed the judgment, holding that Edwards did "place for rent" apartments listed with the agency. (The conviction of Booth, upon the ground that he aided and abetted the unlicensed salesman, was affirmed.)

Appellant also contends that the evidence was not sufficient to support the findings of the commissioner. She argues that the evidence to the effect that the places were not available or suitable for renting was hearsay in that the testimony of the complaining witnesses regarding non-availability and nonsuitability were statements that had been made to them out of the presence of appellant. As above shown, all the prospective renters (except one) in the 16 alleged violations testified that they had seen the newspaper advertisements prior to going to appellant's place of business. Each of them testified that he told appellant or one of her agents that he wanted to rent an apartment or house under certain conditions; that he paid \$5 to appellant and received from her listings of residential property and a receipt for \$5.

Mrs. Leatherman testified that she told appellant's agent that she wanted a one or two bedroom house for herself and children for not more than \$50 per month; the agent gave her six listings; one place had been rented a week previously and a lady told her that the agency had been notified previously; another place had been rented; two other places were single apartments; another place was a converted garage; each day for about three weeks thereafter she tried to telephone the agency but the agency's telephone was busy; later she talked with appellant who told her that she did not have time to give listings to people who had already registered but that she gave listings only to new registrants.

Mrs. Lynch testified that she told appellant's agent that she wanted to rent a two-bedroom apartment for not more than \$50 to \$60 per month; the agent, after stating that she hoped to find a place for her, supplied her with eight listings; Mrs. Lynch went to all those places and found that seven of them had been taken and that one was a hotel at a rent of \$75 per month.

Mrs. Thompson testified that she told appellant's agent that she wanted a "single" apartment for about \$35 a month; the agent gave her two listings; as to one of the listings she found that there was no such address; she telephoned to the other

place and a lady told her that it had been rented two weeks.

Mrs. Rexroad testified that she told appellant's agent that she wanted a three-room house—a kitchen, living-room and a separate bedroom—and not a house in the rear; the agent gave her four listings; she went to the address of one listing and it was not for rent; she went to another of the listings and it had been rented for some time; the other listing was one room and a kitchenette "in the rear"; she called the telephone number for one of the listings several times and received no answer; she received three more listings from appellant; she was informed by the owner or manager of one of said places that it had been rented for five weeks and that the agency had been told several times that it had been rented; she was informed by a man at another listing that it had been rented for two months and that he had informed appellant's agency three or four times that it had been rented; she called the telephone number at the third listing several times but received no answer; she received two more listings; she called the telephone number at one of those listings and was told that the place had been rented for a week and that appellant had been so notified; she called the telephone number at the other listing and was informed that it had been rented for some time; thereafter she received two additional listings; she called the telephone numbers for both of those listings and was informed that they had already been rented.

Eleven other witnesses gave similar statements of the unavailability or unsuitability of the places to which they were sent.

Appellant testified, in part, that in June, 1950, she registered about 800 persons for rental services; the most that she registered in any month was about 1,500; a listing is presumed to be available until cancelled definitely; when a listing is two weeks old it is discarded; each of her agents is responsible for his own cancellations of listings; it is impossible "to qualify" all of the listings, which they give out, to see whether they are still available for rent; when she has a new listing she gives it to more than one prospective tenant—she

gives it to as many as ask for that price range.

The testimony that there were no addresses such as certain addresses given by appellant was not hearsay. The testimony of witnesses, who went to various places listed by appellant, that certain places were not houses or apartments or were not in specified areas or did not have the specified number of rooms or were not downstairs or were furnished was not hearsay. Also the testimony that places were not available for renting was not hearsay.

[2-4] The testimony that persons at some of the places told the registrants that the places had been rented or that appellant had been notified of such renting or that the places were not for rent or had not been listed with appellant was hearsay. Such testimony may be used, however, for the purpose of explaining the direct evidence that the registrants were unable to rent the places. The testimony was admissible, not to prove the truth of the statements made to the registrants, but to explain the evidence that the places were not available for renting. In section 11513 of the Government Code, chapter 5, entitled "Administrative Adjudication," it is provided in part: "* * * Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. * * *" Hearsay evidence alone is insufficient to satisfy the requirement of due process of law, and mere uncorroborated hearsay does not constitute substantial evidence. *Walker v. City of San Gabriel*, 20 Cal.2d 879, 881, 129 P.2d 349, 142 A.L.R. 1383. As above shown, the statute specially permitted hearsay in this proceeding before the commissioner. The evidence as to what was said by persons at proposed rental

places, with respect to non-availability of the places for renting, was the kind of evidence on which persons who inquire for rental property are accustomed to rely. Such hearsay evidence did not stand alone and was not uncorroborated. Appellant testified that she was doing business with a tremendous number of people, she registered several hundred persons per month, it was impossible to check all the listings to see whether they were still available, and she presumed that all the listings handed out by her office were available. Furthermore, irrespective of the hearsay evidence, the direct and non-hearsay evidence, above referred to, to the effect that many of the places to which the registrants were referred were nonexistent or were not the kind of property specified by the registrants, was sufficient to support the order of the commissioner. Appellant was the agent of the prospective renters and she charged and received from each of them \$5 for furnishing information regarding rental property. As a real estate broker, and as such agent, it was her duty to disclose to them that she did not know whether the places to which she referred them were available for renting and that she was merely presuming that the places were available. When the hearing officer asked her if she instructed her agents to tell the registrants that the property was just presumed to be available, she replied "Our contract covers that"—it "sets forth very particularly that we take no responsibility for prior rentals." Her reply was stricken out as not being responsive, and then she said that she instructed her agents to tell the registrants that the properties are presumed to be available. As above shown, many of the registrants testified that they had seen appellant's advertisement in a newspaper prior to going to her office. The advertisement recited in part "renters see Cornelia Dyer * * * for best rentals available." Those registrants, upon arriving at the office, told appellant or her agents what kind of property they wanted to rent, and they paid the registration fee. Thereupon appellant or her agents gave the registrants certain addresses. The commissioner found, as above stated, that appellant in-

tentionally concealed the fact that she had no actual knowledge of the availability of said places for renting; that the provision of the written agreement (to the effect that no guarantee is made as to price of rental, location or acceptance of registrant) was in direct conflict with the oral representations of appellant that rentals were available in particular areas at specified rents; and that in violation of her duty as an agent she did falsely represent to the registrants that the real properties were available for rental purposes without actually having knowledge thereof. The trial court properly found that the findings of the commissioner were supported by the weight of the evidence.

[5] Section 10176 of the Business and Professions Code provides, in part: "The commissioner may * * * revoke a real estate license * * * where the licensee * * * has been guilty of * * *

(b) Making any false promises of a character likely to influence, persuade or induce.

(c) A continued and flagrant course of misrepresentation or making of false promises through real estate agents or salesmen. * * * (i) Any other conduct * * *

which constitutes fraud or dishonest dealing." As above stated, the commissioner found that appellant had violated said subdivisions of section 10176. Appellant asserts that said subdivisions (c) and (i) of said section 10176 fail, by reason of their uncertain language, to comply with the Constitution of California, particularly article IV, section 24. She states, in her brief, that said section of the Constitution provides that "all law shall be couched in such language as may be readily understood." That section of the Constitution provides, in part: "* * * all laws of the State of California, and all official writings, and the executive, legislative, and judicial proceedings shall be conducted, preserved, and published in no other than the English language." The language of said subdivisions (c) and (i) of section 10176 of the Business and Professions Code is not uncertain, and those sections comply with said article IV, section 24, of the Constitution. In *Denny v. Watson*, 114 Cal.App.2d

491, 250 P.2d 692, the petitioners sought a writ of mandate directing the real estate commissioner to vacate his order revoking their licenses as real estate brokers. The petitioners therein challenged the constitutionality of section 10176, subdivision (i), of the Business and Professions Code and asserted that it violates due process of law guaranteed by the state and federal Constitutions. The court therein held, 114 Cal.

App.2d at page 495, 250 P.2d 692, that said subdivision was constitutional, and said, 114 Cal.App.2d at page 493, 250 P.2d at page 693: "Undoubtedly the Real Estate Commissioner was empowered to determine whether petitioners were guilty of acts involving dishonest dealings."

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.



